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Melinda J. Davison

November 20, 2000

*Via Federal Express*

David P. Boergers, Secretary  
Federal Energy Regulatory Commission  
Room 1A East  
888 First Street NE  
Washington, DC 20426

Re: Avista Corporation, Bonneville Power Administration, Idaho Power Company, Montana Power Company, Nevada Power Company, PacifiCorp, Portland General Electric Company, Puget Sound Energy, Inc., Sierra Pacific Power Company  
Regional Transmission Organization Filing  
FERC Docket No. RT01-35-000

Dear Mr. Boergers:

Enclosed for filing in the above captioned proceeding, please find the original and 15 copies of the Protest Industrial Customers of Northwest Utilities and the Direct Service Industries, and the Motion for One Day Extension of Time.

Please return one file-stamped copy of the document in the self-addressed, stamped envelope provided.

Thank you for your assistance.

Sincerely yours,



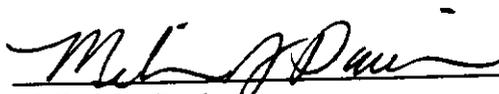
Melinda J. Davison

cc: Service List



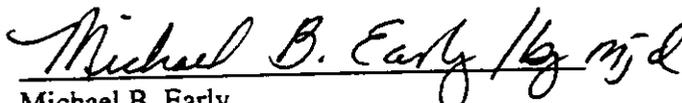
ICNU and the DSIs attempted to electronically file their Protest to the Filing Utilities' RTO West Filing on November 20, 2000 by 5:00 pm EST. All attempts to accomplish electronic filing were unsuccessful due to technical problems. As a consequence, ICNU and the DSIs could not gain access to the FERC server prior to the 5:00 pm EST deadline. Accordingly, ICNU and the DSIs request one additional day, until November 21, 2000, to file their Protest to the Filing Utilities' RTO West Filing. The Protest is being filed simultaneous with this Motion.

Respectfully submitted,



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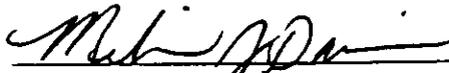
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Of Attorneys for ATOFINA Chemicals Inc.,  
Goldendale Aluminum Co., Northwest Aluminum  
Co.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Motion for One Day Extension of Time of the Industrial Customers of Northwest Utilities and the Direct Service Industries upon each party on the official service list by causing the same to be mailed, postage-prepaid, through the U.S. Mail. Dated at Portland, Oregon, this 20<sup>th</sup> day of November, 2000.

  
\_\_\_\_\_

Melinda J. Davison

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

Avista Corp., The Bonneville Power )  
Administration, Idaho Power Co., The )  
Montana Power Co., Nevada Power Co., )  
PacifiCorp, Portland General Electric Co., )  
Puget Sound Energy, Inc., and Sierra )  
Pacific Power Co. )

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Docket No. RT01-35-000

**PROTEST OF THE INDUSTRIAL CUSTOMERS  
OF NORTHWEST UTILITIES AND THE DIRECT SERVICE  
INDUSTRIES**

November 20, 2000

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West”). The alternative filing explained that the Filing Utilities would make a partial compliance filing on October 23, 2000.

On October 23, 2000, the Filing Utilities completed their “Stage 1 filing,” which requests that the Commission, on an expedited basis, issue a declaratory order with respect to: 1) the form of RTO West Articles of Incorporation and RTO West Bylaws; 2) the scope and configuration of RTO West; and 3) the form of Agreement Limiting Liability Among RTO West Participants (“Liability Limitation Agreement”). RTO West Filing at 93. Three of the Filing Utilities (BPA, Idaho Power and PacifiCorp) also requested that the Commission issue a declaratory order approving the “concepts as a package embodied” in the Transmission Operating Agreement (“TOA”). Id. at 95. Six of the filing utilities state that they require additional time to review the proposals, and note that all nine Filing Utilities expect to agree to propose a final RTO West TOA by December 1, 2000. Id. at 94. ICNU and the DSIs urge the Commission to defer any ruling until the proposal is complete, and afford the customers an additional opportunity to submit additional comments on the proposal when additional components, including the final TOA, are filed with the Commission.

The Filing Utilities also expect to make a “Stage 2 filing” in the spring of 2001. Id. at 92. The Stage 2 filing will include: 1) the RTO West Tariff; 2) the Paying Agent Agreement; 3) the schedule of Transfer Charges; and 4) the allocation of firm transmission rights (“FTRs”). Id. at 6.

Pursuant to the Commission’s Notice of Filing issued on October 24, 2000, in this proceeding ICNU filed a Motion to Intervene on November 16, 2000, and the DSIs filed a Motion to Intervene on November 17, 2000.

ICNU is an incorporated non-profit association of large industrial electric customers in the Pacific Northwest, with offices in Portland, Oregon. A list of ICNU's members is included in ICNU's Motion to Intervene. ICNU was an active participant in the RTO West collaborative process known as the Regional Representative Group ("RRG"). ICNU's members represent approximately 2,100 MW of load in the Northwest who purchase power and transmission services from publicly owned utilities and investor-owned utilities.

The DSIs are Alcoa Inc., ATOFINA Chemicals Inc., Columbia Falls Aluminum Co., Goldendale Aluminum Co., Kaiser Aluminum & Chemical Corp., and Northwest Aluminum Co. In aggregate, the DSIs operate over 2,700 MW of facilities in the geographic area to be served by RTO West. Each DSI is an Eligible Customer under the proposed RTO West tariff, each has long-term transmission contracts with at least one filing utility, and the DSIs were represented on the RRG.

ICNU and the DSIs are the only representatives of industrial customers that participated in the RTO West collaborative process. Neither ICNU nor the DSIs endorse the comments of "the Industrial Consumers" filed on behalf of Washington, D.C. based trade associations who represent certain industrial interests. In fact, there are many statements made by the so-called "Industrial Consumers" with regard to RTO West that ICNU and the DSIs specifically oppose.

## II. PROTEST

### A. **The Request for a Declaratory Ruling is Inappropriate Because it is Premature and Would Require the Commission to Base its Decision on Vague and Incomplete Information**

ICNU and the DSIs urge the Commission to decline to issue a declaratory order as requested by the Filing Utilities on the basis that this request is premature. The mere fact that RTO West was unable to submit a complete proposal in its Stage 1 filing does not warrant piecemeal decisions from the Commission. The Filing Utilities have the burden of showing why the RTO West Filing is sufficient under the Federal Power Act ("FPA"). 16 U.S.C. § 824d (2000). The Commission will only grant this declaratory ruling if the Filing Utilities can show the filing will produce nondiscriminatory, just and reasonable rates. 16 U.S.C. § 824d(a) ("any such rate that is not just and reasonable is hereby declared to be unlawful.") FERC should decline to rule on the proposal or any portion of it, because the proposal is vague and incomplete.

The Administrative Procedures Act allows a Federal Agency to issue a declaratory order to terminate a controversy or to remove uncertainty. 5 U.S.C. § 554(e) (2000). Under the Commission's Rule of Practice and Procedure, it may issue a declaratory order when it is appropriate to terminate a controversy or remove uncertainty. 18 C.F.R. § 385.207(a)(2) (2000). The decision to provide declaratory relief is based on the discretion of the Commission. Phillips Petroleum Co. and Marathon Oil Co., 58 F.E.R.C. ¶ 61,290 (1992). However, the Commission will not issue a declaratory order based on anticipating material facts. Panhandle Eastern Pipe Line Co., 88 F.E.R.C. ¶ 61,262 (1999).

FERC should decline to rule based on the vague and incomplete information provided in the RTO West Filing. Three of the Filing Utilities request that the Commission approve the “concepts” embodied in the RTO West TOA and approve the portions of the RTO West Filing without any understanding as to how they will be impacted by the Stage 2 filing. RTO West Filing at 95. However, the Filing Utilities have not yet agreed to the final terms of the TOA, nor do they intend to complete the Stage 2 filing until the spring of next year. Id. at 92, 94. Most key aspects of RTO West are undecided and may impact FERC’s consideration of the issues presented in this Docket. Id. at 92-95.

Declaratory orders “are applications of the law to a particular sets of facts . . . [and] are of limited use when applied to different factual circumstances.” Phillips Petroleum Co., 58 F.E.R.C. ¶ 61,290 at 61,932. Any Commission declaratory order issued before the entire proposal is available for analysis would most likely generate controversy rather than terminate it, and thus, not fulfill the objective of a declaratory order. Id. The Commission cannot adequately consider the issues raised by the request when the agreements for which approval is sought have not been finalized. The concepts “embodied” in the TOA could easily change before the amended filing is submitted for approval. In addition, important aspects of the Stage 2 filing may significantly alter this RTO West Filing. The Commission will be required to anticipate a controversy or factual circumstances that cannot be known until at least all nine of the Filing Utilities have agreed to ask the Commission for consideration of their entire proposal. The limited information presented by the Filing Utilities is an insufficient foundation on which to base a declaratory ruling by the Commission.

**B. RTO West's Bylaws and Governance Must Be Revised to Allow Adequate Participation by Large Retail Customers and Regional Trade Organizations Representing the Interests of Retail Customers**

The definition of "Retail Customer" in Bylaws Article 1 § 1(kk) should eliminate the reference: "any governmental or bona fide public interest organization which demonstrates to the reasonable satisfaction of the Corporation that it is authorized by statute or otherwise to advocate the interests of such Retail Customers, or any segment thereof, as retail electric customers." While such a provision may be appropriate for "Small Retail Customers" (See § 1(t t)), this provision is unnecessary when applied to Large Retail customers. See § 1(s). Large retail customers generally have a level of interest which justifies either their direct involvement or that of a trade organization. Trade organizations of large retail customers such as ICNU, as opposed to "governmental" or "public interest" organizations, are more appropriate to fulfill this role. There is no counterpart in the definition of "Major Transmitting Utility" (§ 1 (u)), "Transmission Dependent Utility" (§1(ww)), or any other class which make up the Trustees Selection Committee.

Article V § 3(b)(iv) provides for class voting within the retail customer class. Subpart (B) provides that four members of the Trustee Selection Committee shall be Large Retail Customers provided that one seat shall be elected by and held by Large Retail Customers that are also Scheduling Coordinators. This should be clarified to provide that in the event that no Larger Retail Customers are also Scheduling Coordinators, then all four seats shall be elected by and held by Large Retail Customers.

FERC should recognize that the governance structure does provide adequate regulatory oversight. There are no significant checks and balances to RTO actions, particularly those that commit the RTO to long-run expenses. The RTO West is not a Transco

where imprudent costs will be disallowed, nor is the RTO West a public body where elected officials can be ousted. If the organization becomes insolvent, imprudent costs must be collected from RTO uplift charges. Loads, which will ultimately pay for imprudent decisions, comprise only one sixth of the trustee-selection body and will be unable to oust the trustees of RTO West .

ICNU and the DSIs are not proposing a significant change in governing structure for RTO West at this time, but if FERC does not choose to exert considerable approval authority over RTO West's expenses and capital plans—the latter in advance of significant outlays—ICNU and the DSIs would ask to revisit the governance issue at Stage 2. ICNU and the DSIs also request that FERC specifically address the issue of FERC oversight of RTO West capital and operating budgets before irreversible commitments are made.

**C. BPA is Without Legal Authority to Participate In the RTO**

Independence of the RTO from market participants is the bedrock for formation of an RTO. Independence from market participants means: 1) RTO employees/directors must have no financial interest in any market participant; 2) the RTO decisionmaking process must be independent of control by any market participant; and 3) the RTO must have “exclusive and independent” authority to file changes to its transmission tariff under FPA § 205. However, that foundation is brought into question in the RTO West TOA with the general reservation of rights by Participating Transmission Owners (“PTOs”). Furthermore, BPA's obligation to retain control over federal transmission facilities creates a potential conflict with RTO independence.

The Department of Energy ("DOE") acknowledged this conflict in its comments submitted to the Commission during the RTO rulemaking proceedings. DOE stated:

The Administration recognizes that independence is a fundamental RTO principle, and that PMA ["Power Marketing Administration"] retention of control over their transmission systems could compromise that independence. Therefore, the Administration has proposed statutory language as part of CECA [Comprehensive Electricity Competition Act] that allows delegation of control over the PMA transmission systems. Such legislation should remove any legal impediments to the full participation in RTOs by the PMAs.

Comments of the U.S. Department of Energy, Regional Transmission Organizations,  
Docket No. RM99-2 at 18 (Sept. 3, 1999) ("DOE Comments").

Such legislation was not enacted, and thus, the question remains whether there is any overlap between RTO independence and BPA's obligations to retain control of its transmission facilities and, if so, whether the TOA falls within that overlap.

DOE's Acting General Counsel addressed BPA's Authority to Participate in an RTO in a February 26, 1998 memorandum entitled Bonneville Power Administration Authority to Participate in an Independent System Operator. Specifically, DOE addressed constitutional limitations on the delegation of governmental authority to private parties. DOE reviewed the following court opinions: Gleave v. Graham, 954 F. Supp. 599, 608 (W.D.N.Y. 1997) ("subdelegation of executive authority by a federal agency to a private party is not invalid . . . provided such federal agency retains final reviewing authority"), United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972) (final decision-making authority concerning eligibility of local charities would not rest in a private organization, but with the federal agency); Riverbend Farms, Inc. v.

Madigan, 958 F.2d 1479 (9th Cir. 1992), *cert. denied*, 506 U.S. 999 (1992) (delegation not improper where federal agency retains authority to depart from or ignore recommendations by private group); and Schultz v. Milne, 849 F. Supp. 708, 712 (N.D. Cal. 1994) (relying on precedent addressing delegation by federal agencies, found that “the state may not constitutionally abdicate or surrender its power to regulate land-use to private individuals without supplying standards to govern the use of private discretion”) *dismissed on other grounds*, 1996 U.S. App. Lexis 26,206 (Oct. 3, 1996). Guided by these cases, DOE concluded:

[E]ntering into a contract with an ISO which provides standards with regard to the exercise of discretion by the ISO, retains oversight for BPA to ensure compliance by the ISO with such standards, and enables BPA to withdraw for failure to comply with the standards should withstand a constitutional challenge to the delegation of authority by BPA to an ISO to operate its transmission system.

DOE Comments at 6.

The TOA purports to establish such performance standards. However, a review of the TOA shows: 1/ (1) standards are not present for certain discretionary decisions delegated to RTO West but which BPA is obligated by statute to make; and (2) certain standards provide BPA with continuing control that is inconsistent—in any practical sense—with RTO independence. *See, e.g.*, RTO West TOA, §§ 5.2.3, 13.1.2 and 14.1.

For example, BPA has a statutory obligation to establish transmission rates for use of federal facilities with standards established under the Bonneville Project Act, the Flood Control Act, the Transmission System Act, and the Northwest Power Act. 16 U.S.C. §§ 832-832i (2000); 16 U.S.C. § 825s (2000); 16 U.S.C. §§ 838-838k (2000); 16 U.S.C. §§ 839-839h

(2000). BPA exercises discretion in setting its rates. In addition, BPA currently exercises its discretion to provide a number of different types of service (*e.g.*, PTP, NT, IR).

During the Company Rate period, BPA establishes the Company Rate as a charge in the RTO West Tariff without FERC review of such rate.<sup>2/</sup> However, access to federal transmission by BPA Company Loads also requires the payment of the RTO West uplift charge, over which BPA exercises no control. In addition, under TOA § 5.2.3, RTO West can incur costs to maintain transfer capability on BPA's system and recover such costs as a surcharge to BPA's Company Loads. Under RTO West TOA, auction revenues from the sale of any BPA firm transmission rights—normally credits against the company rate—will be diverted by the RTO to non-BPA purposes. RTO West TOA, §§ 5.2.3, 13.1.2, 14.1, 15.2 and Exhibit A; Company Rules. In the post-Company Rate period, BPA only establishes its “revenue requirements” and the RTO West will exercise its discretion to establish all charges for the use of federal transmission facilities. RTO West TOA § 13.1.2. RTO West and the Executing Transmission Owner “agree to cooperate . . . in developing such [post-Company Rate] rate structure.” RTO West TOA § 14.1. These provisions are likely to be found at odds with BPA's current statutory mandates and obligations.

Thus, in the TOA, BPA abdicates to RTO West, over the long-term and without any standards, its statutory obligation to establish rates—including both mandated and discretionary decisions. Even in the short-term, BPA does not provide sufficient standards with regard to all rates that a Company Load must pay for use of federal transmission. For example, a Company Load pays the RTO West an uplift charge even when buying federal

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<sup>1/</sup> Because specific provisions of the TOA are not before the Commission for approval, this review list is not exhaustive.

<sup>2/</sup> See discussion below whether RTO West may include such charges in its tariff without separate FERC review under §§ 205 and 206.

energy for delivery over only federal transmission. RTO West TOA, § 14.2.1; Exhibit G: Company Rates. BPA proposes to give up its discretion to RTO West with regard to the types of transmission service and does not provide any standards to guide RTO West in exercising such discretion.

BPA has a unilateral right to terminate on two years' notice and an immediate right to terminate for RTO West's breach of the TOA. RTO West TOA § 2.3. A unilateral right to withdraw in the context of the obligation to cooperate with BPA, but not cooperate with customers, in setting rates in the post-Company Rate period is contrary to creating an independent RTO West. RTO West staff and management will likely not miss the fact that their long-term survival depends on the contentment of BPA, which remains a vertically integrated utility.

**D. The RTO's Attempt to "Build In" Stranded Cost Obligations and Rights Is Contrary to FERC Regulations**

ICNU and the DSIs object to the RTO West's authority to exercise control over, and modification of, existing stranded cost obligations because they are contrary to FERC precedent and its rules and regulations. As currently filed, the RTO West would alter existing stranded cost obligations and provide the RTO West with the authority to resolve certain stranded cost disputes. RTO West TOA, § 13.4 and Exhibit A: Schedule of Definitions. The RTO West would define stranded cost obligations, have the authority over the determination of which individual loads have stranded cost obligations and the ability to charge "an automatic adjustment clause or other provision [to provide] recovery of such Stranded Costs as a surcharge for Transmission Service . . . ." *Id.* The obligations of customers who may be required to pay stranded costs should be determined at the time of the request for payment; it is highly inappropriate to prejudge

stranded costs with the RTO filing. Further, it is also inappropriate to assume that all stranded costs should be collected from transmission loads connected to RTO West.

ICNU and the DSIs do not object to the RTO West acting as a billing agent for stranded costs determined pursuant to a regulatory or statutory process, but specifically oppose the RTO West: 1) specifying which loads have stranded cost obligations; 2) shifting the burden of proof on stranded cost liability from the utilities to certain loads; 3) classifying certain generation assets as transmission assets; and 4) usurping state authority over retail stranded costs.

FERC approval of an RTO granting itself authority over stranded costs is inconsistent with the FERC requirements that the Commission has the authority to resolve wholesale stranded cost issues and that the Commission remains neutral regarding state retail stranded cost issues. *See* Open Access Transmission Services, Order 888, 75 F.E.R.C. ¶ 61,080, FERC Statutes and Regulations ¶ 31,036 at 31,791 (1996)(“Order 888”). FERC’s authority over stranded costs may not be delegated to an RTO. *See e.g.* Cajun Elec. Power Coop. v. FERC, 28 F.3d 173 (D.C. Cir. 1994); Western Resources, Inc. v. FERC, 72 F.3d 147 (D.C. Cir. 1995).

In addition, the RTO West Filing refers only to stranded costs, and ignores the existence of stranded benefits. As filed, the RTO West would allow the Filing Utilities to recoup stranded costs, but does provide stranded benefits for customers. Any provisions in the RTO West Filing regarding stranded costs or benefits must have reciprocal impacts for both utilities and customers. The focus on utility recovery of stranded costs, but not upon returning stranded benefits to customers, illustrates the Filing Utilities’ bias toward maximizing potential stranded cost recovery.

1. **The RTO West Filing Modifies Wholesale Stranded Costs Rights and Obligations**

FERC has established itself as the proper jurisdiction to determine the recovery of wholesale transmission related stranded costs. Order 888, at 31,788-91. While FERC has recognized that wholesale stranded costs are small relative to retail stranded costs, it has determined that resolution of wholesale stranded cost issues are “critical to the successful transition of the electric industry to a competitive, open access environment.” Id. at 31,789.

In Order 2000, FERC did not depart from the wholesale or retail stranded cost policies established in Order 888. Regional Transmission Organizations, 89 FERC ¶ 61,285, F.E.R.C. Statutes and Regulations ¶ 31,089 (1999) (“Order 2000”). During the proceedings leading to the adoption of Order 2000, Puget Sound Energy, Inc. (“PSE”) requested that RTOs be allowed to provide for full stranded cost recovery, removing FERC jurisdiction over wholesale stranded costs and state jurisdiction over retail stranded costs. PSE Initial Comments, Docket No. RM99-2-001 at 6. FERC rejected PSE’s arguments and declined to modify its existing stranded cost recovery policies. Order 2000, at 31,196.

The RTO West TOA ignores current FERC policy by modifying existing wholesale stranded cost obligations and creates stranded cost obligations for customers who otherwise would not be liable for those costs. In particular, the RTO West TOA specifies which loads will be liable “for the recovery of Stranded Costs” and extends stranded cost liability to loads that cannot “demonstrate sufficient transmission interconnections with transmission providers other than with the Executing Transmission Owner.” Id.

The RTO formation process is not the proper forum by which stranded cost obligations and rights should be determined. The Filing Utilities are utilizing the RTO approval process to predetermine future FERC investigations regarding both the extent of stranded cost obligations and which customer loads are subject to these obligations. The RTO West modifies existing wholesale stranded cost obligations and rights by: 1) determining which loads may be obligated to pay stranded costs; 2) altering the burden of proof for stranded cost recovery from the transmission utility to its customers; and 3) modifying existing cost allocations between transmission and power functions. Id.

The RTO West TOA resolves and creates stranded cost obligations for any utility customer load that “as of the date of [the] Agreement, or any time hereafter” is linked, or would have been linked, to an Executing Transmission Owner’s (“ETO”) transmission facilities, irrespective of the customers rights under state or federal law. RTO West TOA, § 13.4. Therefore, any load that ever was, or might have been, linked to an ETO will be subject to the RTO West’s determination of its stranded cost liability. FERC should not consider this broad modification in the scope of potential liability for stranded costs in the context of an RTO formation, but only in a specific stranded cost proceeding that will provide a more searching analysis of its potential impacts. The broad scope of stranded cost liability in the RTO West Filing may allow ETOs to recover stranded costs from loads: 1) they never have had jurisdiction over; 2) that never will or would have had access to the ETOs transmission facilities; 3) with retail but not wholesale stranded cost obligations; 4) that may have already negotiated their stranded cost obligations; and 5) that may have no stranded cost obligation whatsoever.

Loads which will not be connected to the RTO West prior to its formation, but would have been connected to an ETO, will have the burden of proof as to stranded cost liability. RTO West TOA, § 13.4. Under the RTO West Filing, a load which has never been connected to an ETO would have to “[demonstrate] sufficient transmission interconnections with other transmission providers” to avoid stranded cost liability. Id. The only way a load would be allowed to demonstrate these sufficient connections is by proving: 1) there is an available “alternative path(s) [with sufficient] transmission capacity;” and 2) “the cost of wheeling over the alternative path(s) would have been economical when compared to the total cost of wheeling over the Executing Transmission Owner’s Transmission Facilities, including the payment of Stranded Costs.” Id.

Section 13.4 of the RTO West TOA violates FERC policy and is impracticable. FERC policy states that wholesale stranded cost recovery “should not insulate a utility from the normal risks of competition,” but is allowed only when stranded costs are “legitimate, prudent and verifiable.” Order 888, at 31,789. FERC has placed the burden upon the utility to “make the necessary evidentiary showings [to be] eligible for stranded cost recovery.” Id. at 31,790. This is consistent with the requirement that the Filing Utility has the burden of proving its transmission tariffs, including stranded costs tariffs, are nonpreferential, just and reasonable. FPA, 16 U.S.C. § 824d. The Filing Utilities’ stranded cost provision violates federal law and FERC policy by placing an unreasonable burden upon customer loads to demonstrate that they are not liable for stranded costs.

The provision regarding stranded cost obligations for loads that have never been connected to an ETO is also unworkable and does not contain reasonable standards. Stranded costs are merely the above market cost of resources. FERC has not yet clearly established how stranded cost obligations will be allocated between utilities and customer loads, and between different customer loads. However, the RTO West methodology for determining whether a customer load has any stranded cost obligation requires the customer to first calculate their stranded cost obligation. RTO West TOA, § 13.4. This task is virtually impossible for any customer, and it will hold customers responsible for stranded costs for which they are not liable under current law.

The RTO West Filing modifies existing FERC policy regarding the allocation of costs between transmission and power functions. FERC policy states that facilities “used to meet generation needs through the importation of power from other systems . . . should be allocated to [the utilities’] power sales customers.” Northeast Utilities Service Co., 86 F.E.R.C. ¶ 61,161 at 61,569 (1999). FERC has segmented transmission costs into different rates for non-contiguous lines. *See e.g.* Puget Sound Energy, Inc., 88 F.E.R.C. ¶ 63,001 at 65,008 (1999). FERC recognizes that costs for transmission assets tied to the delivery of remote generation must be allocated to the generation function of utilities. This is especially important in the Northwest because of certain utilities decision to “ship coal by wire” (*e.g.*, PSE's ownership interest in Colstrip) by building transmission lines to remote power plants, rather than shipping coal to centrally located power plants. The proposed RTO West Filing does not appropriately separate those transmission facilities tied to remote generation, and may allow their inclusion as wholesale transmission related stranded costs.

The RTO West provisions regarding stranded costs creates new, and significantly modifies, existing retail and wholesale stranded cost rights and obligations. These changes may have dramatic impacts upon the stranded cost obligations of individual Northwest customer loads. These changes not only conflict with established FERC policies and erode state regulatory authority, but are being proposed in a manner that minimizes their significance. ICNU and the DSIs oppose both the Filing Utilities attempt to mask the importance of their proposed changes, and the actual changes to stranded cost rights and obligations.

**2. The RTO West Filing Usurps State Regulatory Authority Over Retail Stranded Cost Issues**

FERC has appropriately removed itself from resolving state retail stranded cost and stranded benefit issues. FERC has recognized that its authority over stranded costs extends only to wholesale related stranded costs, not retail related stranded costs. Order 888, at 31,825. In addition, FERC policy leaves stranded cost recovery occasioned by retail wheeling to state regulatory agencies. *Id.* FERC will “allow utilities to seek recovery of stranded costs caused by retail wheeling only in circumstances in which the state regulatory authority does not have authority to address retail stranded costs at the time the retail wheeling is required.” *Id.* at 31,637. No state regulatory body within the proposed boundaries of the RTO West has relinquished its authority over retail stranded costs.

Purportedly, the RTO West Filing is not “intended to create, modify or extinguish any [stranded cost] right or obligation . . . [and any such stranded cost rights or obligations] shall be as if this Agreement had not been executed.” RTO West TOA, § 13.4. However, the details in the RTO West TOA conflict with this stated objective.

The TOA proceeds to create and modify existing retail and wholesale stranded cost rights and obligations. Id. The RTO West will be authorized to recover nearly all stranded costs, including: 1) any FERC approved costs related to reduction in power cost loads; and 2) all stranded costs related to “the recovery of power costs that the Participating Transmission Owner is unable to fully recover through its revenues for the sale of power . . . .” Id. at Exhibit A: Schedule of Definitions. This latter provision makes no mention of regulatory or statutory authorization for the Participating Transmission Owner to make such a claim. As proposed, FERC resolution of, and RTO authority over, these power cost related stranded costs usurps state regulatory authorities by inserting both the RTO West and FERC into the determination and allocation of retail based stranded costs.

#### **E. The RTO West Hinders State Retail Access Efforts**

The RTO West must accommodate retail access by providing broad transmission access consistent with state and federal law. Because transmission pricing, availability and conditions upon service are important issues for both the DSIs and ICNU’s members, ICNU and the DSIs oppose the RTO West Filing’s obstruction of state retail access legislation. As filed, the RTO West hinders retail access by: 1) allowing ETOs to violate state and federal law by restricting end user access; 2) allowing ETOs to block transmission access to new transmission participants; and 3) providing only limited rights to Eligible Customers.

FERC adopted Order 2000 to require open access transmission service that will facilitate competition in wholesale power markets, an important component of retail access. Order 2000, at 30,992. Several states in the Northwest are currently in the process of restructuring the retail electric industry. In 1997, Montana enacted retail

choice legislation which should allow electric consumers to purchase their power supplies from third parties in 2002. Nevada is also in the process of implementing retail choice legislation which was enacted in 1997. Similarly, in 1999, Oregon restructured its electric industry mandating customer choice for all industrial and commercial customers by October 1, 2001. While Washington does not have retail choice legislation, Washington also does not have exclusive service territories, and retail competition may occur under current law. Thus, legislation or administrative action requiring retail access are currently pending in most states within the boundaries of the RTO West.

FERC adopted Order 2000 under its authority to improve transmission grid reliability and eliminate discrimination in transmission services. Order 2000, at 30,993. Likewise, FERC's ability to order open access transmission tariffs derives from its responsibility to remedy undue discrimination. Order 888, at 31,669. FERC's authority to remedy undue discrimination and anti-competitive effects does not authorize the Commission to approve an RTO that prevents competition existing under current federal and state law. The RTO West hinders existing and future state retail access legislation by limiting end user access and limiting the rights of eligible customers.

**1. The Narrow Definition and Rights of Eligible Customers Restricts End Use Customer Access**

The RTO West should not be involved in deciding who is or is not an Eligible Customer, and it should not add nor detract from the current federal and state legal rights of end use customers. This principle is embodied in the Governing Agreement of the NW Regional Transmission Association ("NRTA") and in BPA's negotiated Open Access Transmission Tariff § 1.11 ("OATT"). In order to protect end

use customer rights, the definition of an RTO West Eligible Customer should not be limited.

While the specific definition of Eligible Customer has been deferred to future determinations in the RTO West tariffs, the TOA does not prevent the RTO West tariffs from narrowing the classes of existing Eligible Customers. RTO West TOA, at Exhibit A: Schedule of Definitions. Previous Northwest regional discussions surrounding the definition of Eligible Customers have avoided contentious disputes by not limiting the definition. See e.g. Proposed IndeGo OATT, § 1.29; Proposed BPA OATT, § 1.11. FERC, and not the RTO West TOA or RTO West tariffs, should retain the exclusive authority to define who is an Eligible Customer and the RTO West TOA should be modified accordingly.

The rights of Eligible Customers have been narrowed throughout the RTO West TOA. For example, Section 4.2, which deals with physical interconnections, does not properly recognize the interests of Eligible Customers. The RTO West TOA requires transmission owners to cooperate with and provide new physical interconnections upon the request of Electric Utilities and Generation Owners, but not Eligible Customers. RTO West TOA, § 4.2.1. Eligible Customers are also omitted from §§ 4.2.2 and 4.3. It is improper to exclude Eligible Customers from the rights provided in these sections or to limit such rights to Electric Utilities and Generation Owners.

**2. The RTO West Filing Allows the Filing Utilities to Illegally Restrict End Use Customer Access**

The RTO West Filing allows ETOs greater ability to prevent end user access and retail competition than currently provided under the majority of prospective RTO West jurisdictions. The RTO West TOA allows an ETO to elect to adopt language

in Section 24, Retail Power Deliveries on Transmission Facilities. Section 24 will apply if FERC is prohibited from ordering service under Section 212(h) of the FPA. FPA, 16 U.S.C. § 824K. Section 24 allows the ETO to refuse to offer service to end-users unless:

1. Unbundled retail transmission access to the specific customer is required by an authority of competent jurisdiction under local, state, tribal, provincial or federal law;
2. The customer is a Direct Service Industrial Customer [3/] or
3. The transmission owner voluntarily agrees.

RTO West TOA, § 24. Of particular concern is subpoint 3. This gives the transmission owner broad discretion that is inappropriate in the context of an RTO.

Including Section 24 in the RTO West TOA provides significant new rights to any ETO seeking to limit existing retail competition and uses RTO West to enforce those rights. Subsection 1 of Section 24, allowing an ETO to limit retail access unless ordered to provide access to the specific customer, is unduly narrow and burdensome. First, before obtaining transmission service, retail customers that already have the legal right to unbundled transmission access would potentially have the additional burden of seeking a judicial or administrative determination of their rights. (BPA required this of International Paper Company (“IP”) and three years later the litigation continues with IP’s original utility power supplier.) Next, each specific retail

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3/ The DSIs specifically request that § 24(2) be modified to add the underlined material below:

... such end use customer was an “existing direct service industrial customer” of the Bonneville Power Administration as defined in Section 5(d)(4)(A) of the Northwest Power Act (16 U.S.C. § 839c(d)(4)(A)) as of the effective date of such act or is a successor in interest to such customer, or has a transmission contract with Bonneville Power Administration as of the effective date of this Agreement.

customer, not class or group of customers, will be required to jump over this additional judicial or administrative hurdle before obtaining the services they are entitled to receive. Finally, the requirement to seek authorization to access the RTO West will prevent retail customers from exercising their existing rights to bypass an ETO's facilities to take service under another transmission owner's facilities.

Subsections 1 and 3 of Section 24 expose the RTO West and ETO to potentially significant liability under state and federal antitrust and retail access statutes. Allowing ETOs to pick and choose which retail customers they will provide retail transmission access will violate state and federal antitrust laws because Washington currently, and Oregon, Montana and Nevada will soon, explicitly encourage or require retail electric competition. Additionally, in many states electric utilities face additional monetary penalties for refusing to comply with state retail competition statutes. *See e.g.* RCW § 80.04.440 (Washington utilities liable for damages for violation of law); ORS § 756.185 (Oregon utilities liable for damages for violation of law). Both ETOs and the RTO West could be liable under these laws.

The RTO West Filing also allows ETOs wide latitude in objecting to the provision of transmission service to new transmission participants. RTO West TOA, § 3.2.2. An ETO may decline to provide new transmission service for any reason under the RTO West Agreement, including if the transmission service would impair the ETO's rights under the RTO West Agreement. The RTO West Filing leaves the definition of "impairing an ETO's rights" up to RTO West. *Id.* at § 3.2.3. This raises an additional, currently nonexistent burden for loads to obtain unbundled transmission access.

It is essential to Northwest industry that a regional RTO offer a non-discriminatory open-access transmission system. In recent years industrial customers have been active in seeking competitive power supplies and some members have the ability to directly secure their electric power, but the extent of their participation in the Northwest will increase as enacted retail access legislation is implemented. It is essential to the economy of the entire Northwest region that these highly competitive industries be able to exercise their rights to direct access on a non-discriminatory basis at cost-based transmission rates. At a minimum, FERC should not approve an RTO that allows the Filing Utilities to obstruct end use customers from exercising their state and federal rights to non-discriminatory, unbundled transmission services. *See e.g.* BPA OATT 1.11.4/ Section 24 of the TOA is significantly narrower than the definition of an Eligible

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4/ Section 1.11 provides:

- (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 provided is 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 to 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.

Customer in BPA's proposed OATT. RTO West should be a step forward to broader access, not a step backward.

**F. The Company Rate Pricing Proposal Is Incomplete**

The Commission recognized in Order 2000 that the elimination of pancaked rates within RTO areas and the reciprocal waiver of access charges for transactions that cross RTO borders have the potential to cause significant cost shifting. The Commission committed to monitor the effects of RTO formation and RTO pricing proposals on cost shifting. Order 2000, at 31,172-73. ICNU and the DSIs are very concerned about the cost-shifting potential of the RTO West proposal, particularly in light of the high cost of the RTO West when compared with the anticipated benefits. ICNU and the DSIs therefore request that the Commission assure that cost shifting is kept to the practical minimum. As discussed below, the primary mechanism to address cost shifts, the transfer payment, is incomplete. The Company Rate proposal addresses shifts in transmission charges among utilities, but the TOA ignores significant shifts in power-cost burdens between generation owners and loads and among geographic areas. Moreover, RTO West purports to limit the jurisdiction of the Commission over its rates.

The RTO West proposes a ten-year Company Rate Period, during which loads served by each filing utility will pay a load-based access charge for RTO West transmission service equal to the transmission costs of such utility, adjusted for various transfer and other payments to be negotiated among the utilities. Various elements of the proposal are fundamentally flawed, and must be amended prior to Commission approval.

**1. The Commission's Jurisdiction Must Extend To All RTO Rates**

RTO West and the RTO West tariff are fully jurisdictional, and any rate proposal must meet the requirements of §§ 205 and 206 of the Federal Power Act, as determined by the Commission. However, the RTO West TOA takes the position that during the Company Rate Period, the load-based access fee applicable within portions of the RTO West area under the RTO West tariff are somehow exempt from the Federal Power Act. RTO West TOA, §§ 13, 14. These provisions are simply wrong. RTO West cannot partially exempt itself from Commission jurisdiction merely because some of its constituent parts may not have been jurisdictional entities had they not joined RTO West. The RTO West transmission rates for loads within the areas formerly served by all Participating Transmission Owners must be "just and reasonable" and may not grant any "undue preference" or cause any "undue prejudice or disadvantage to any person." FPA § 205(a), (b). In addition, the rates must also meet the requirements of other laws applicable to such entities. ICNU and the DSIs protest the proposal to exempt any portion of the RTO West transmission charges from full Commission review under the Federal Power Act.

**2. The RTO West Proposal Must Eliminate All Cost Shifts**

A key element of the RTO West pricing proposal is the use of Transfer Charges for Long-Term Transmission Agreements and for Short-Term Firm and Non-Firm Transmission Service to ameliorate transmission-cost shifts. ICNU and the DSIs oppose two elements of this proposal.

First, the amounts of the transfer charges are proposed to be negotiated bilaterally between the Participating Transmission Owners ("PTOs"). This approach is

impermissible since defining the amount of the transfer charges is ratemaking. The affected loads that will pay the resulting rates are entitled to all of the normal procedural safeguards that accompany ratemaking, including discovery and the opportunity to present evidence on the reasonableness of such charges. The rates to be paid by loads located in areas previously served by PTOs whose transmission systems were built to accommodate substantial through or export transactions may be affected as much by the transfer payments as by the cost of the transmission system. In addition, these bilateral negotiations may allow the parties to increase their rights at the expense of ratepayers and market development thereby decreasing the quantity of transmission rights available.

Second, the transfer payment proposal is incomplete. The RTO West Stage 1 filing acknowledges that the transfer payments do not account for all pre-RTO revenues received by transmission owners. RTO West Filing, at 38. RTO West proposes to recover the lost revenues through the RTO West uplift charge that will be imposed on loads throughout the RTO West area. Id. at 37-38. ICNU and the DSIs oppose the proposal. The so called lost revenues are associated with a small number of large merchant generators that will continue to be significant users of RTO West transmission services. Most of this merchant generation was recently sold by PTOs to non-PTOs. The formation of RTO West should not be permitted to transfer to these merchant generators a windfall of free transmission service to be paid for by loads, most of which will not benefit from the generators. RTO West should develop transfer charges to recover the cost of the existing use by the merchant generators of RTO West facilities and require that such generators pay the transfer charges as a condition of service from RTO West.

**3. The Filing Is Inadequate And Is Not A Reasoned Response On Pricing Issues**

ICNU and the DSIs have several additional concerns about the RTO West pricing proposal that cannot be resolved until RTO West makes its Stage 2 filing. For example, RTO West does not propose to impose any export rate, and it is unclear whether the yet to be negotiated reciprocal agreements with neighboring systems will include provision for transfer charges to ameliorate cost shifts. ICNU and the DSIs believe that some form of export rate may be necessary to address cost shifts. ICNU and the DSIs reserve most of their comments regarding the RTO West pricing proposal until the Stage 2 filing and specific RTO West rate proposals.

**4. The Company Rate Definition Incorrectly Determines Rate Design in the TOA Rather than the Tariff.**

Throughout negotiations for RTO West, the concept of Company Rate was discussed in two different ways: to represent revenue-requirements or to represent rates. That is, the Company Rate could preserve revenue requirements over the transition period or it could preserve rate levels. RTO West proposes in this filing to use the rates determination. RTO West TOA, Exhibit A: Schedule of Definitions; Exhibit G: Company Rate.

The TOA locks a ratemaking formula into place for ten years, making loads solely responsible for paying the company costs, including costs that may be imprudent. RTO West TOA, § 4.2, 2.3, 13, 14. For the ten years there is no ability for FERC to use transaction or any other appropriate charges to collect company costs. In addition, because TOA cannot be modified without the consent of the ETOs, the TOA should not include unnecessary provisions. As long as company costs are fully collected,

transmission owners are made whole, so it is unnecessary to determine a rate formula in the TOA.

If FERC makes a determination at this stage for the TOA, it must retain the flexibility to change the design of rates that collect company costs.

**G. RTO West Should Have Consistent Standards For Accepting Control Of Facilities**

With limited exceptions, the RTO West proposes to acquire operational control over transmission facilities that have a material impact on: 1) the transfer capability of RTO-West-managed constrained paths between congestion zones; 2) the ability to transfer power within congestion zones; and 3) the ability to transfer power in or out of the RTO West transmission system. In addition, the RTO West proposes to allow each utility to transfer to the RTO control of, and cost-recovery for, any additional transmission facilities the utility chooses. RTO West TOA, § 5.1.3. ICNU and the DSIs oppose the option to include these non-qualifying facilities into the RTO West system because the proposal violates the principles of comparability and equity. The choice of facilities to include in the RTO West system should not be left to the sole discretion of each individual utility to choose the answer that best serves its narrow interests.

At issue are lower voltage facilities, sometimes referred to as sub-transmission, that are used for service to load and which do not contribute to the flow of power through the local area to another area. These facilities are generally, but not exclusively, 69 kV and lower. Some lower voltage facilities are crucial to power through-flow, but in the RTO West area this condition is the exception. In addition, there are facilities in the 115 kV to 230 kV range that are local load-serving facilities.

Allowing utilities the discretion provided for in the RTO West filing can lead to serious inequities. It may lead to instances in which some PTOs transfer all of their facilities, while other PTOs transfer but a fraction of their facilities. Depending on how rates are designed and costs are recovered after the Company Rate Period, this could result in loads in some PTOs' service territories paying for much of their own utility's facilities as well as a portion of the facilities of other utilities.

It is also inappropriate to require that each utility transfer all of its transmission facilities to RTO West control. For example, Sierra Pacific and Nevada Power have already refunctionalized some of their facilities from transmission to distribution in accordance with Order 888 determinations resulting from the requirement for retail access.

ICNU and the DSIs request the Commission to establish uniform guidelines for the determination of which facilities should be transferred to RTO control, and which facilities should remain the operational responsibility of the transmission owner. The Commission has laid out seven guidelines for determining the functionalization of facilities between Commission-jurisdiction and state jurisdiction when a state adopts retail access. Within the RTO West area, both Sierra Power and Nevada Power have successfully applied this test to re-functionalize their facilities between transmission and distribution. ICNU and the DSIs request that the Commission adopt a similar test for determining which transmission facilities are transferred to RTO West control and which should remain under control of the transmission owner.

ICNU and the DSIs do not believe that a “bright-line” voltage test is adequate to determine how a transmission facility should be treated. ICNU and the DSIs propose the following indicators be considered:

1. (Non-RTO) Sub-transmission, largely lower-voltage, facilities are normally in proximity to end-use customers. Proximity should be considered as a relative term, given that within the RTO West, end-use load may be a great distance from the bulk transmission system.
2. Sub-transmission facilities are primarily radial or looped-radial in character. At times, radial facilities may be looped for reliability purposes or due to the amount of load. This indicator should be used in conjunction with indicator number 3.
3. Power flows to sub-transmission facilities and rarely, if ever, flows out. Power flowing from one broad area to another will not generally flow through sub-transmission facilities. Taking sub-transmission facilities out of service would not significantly affect power flowing from one broad area into another. Although generation may be located on the sub-transmission system, it is mostly consumed within the local area, although the transmission of this power may be governed by FERC-jurisdictional tariffs.
4. Sub-transmission facilities will generally be of lower voltage. Rather than specify a “bright-line” voltage test, this indicator provides further context for the other indicators. It allows for higher voltage service to radial loads to be classified as sub-transmission.

If the Commission allows the RTO West to control facilities that are not necessary to serve the broader bulk power market, ICNU and the DSIs request that the

Commission require ratemaking treatment of such facilities that prevents shifting the cost burden to loads that do not benefit from the facilities. ICNU and the DSIs believe that some form of local voltage level based access charge would be more appropriate.

**H. RTO West Has Failed to Specify Firm Transmission Rights**

ICNU and the DSIs oppose the proposal that “FTRs will be granted to each of the participating transmission owners . . . .” RTO West Filing at 30. Industrial customers believe that the most equitable, nondiscriminatory manner in which to address the allocation of transmission rights is by allocating such rights for the benefit of loads. The FTRs should be allocated directly to loads that are Eligible Customers, and FTRs allocated for the benefit of utility-served loads should be reallocated to the loads when they become Eligible Customers. In addition, after the creation of RTO West, the allocation of FTRs should be directly proportional to the payment obligation, consisting of transfer payments and access fees, paid by the FTR holder. Other significant issues concerning allocation of the FTRs are not addressed by the current RTO filing. The DSIs and ICNU anticipate further comments on this topic once RTO West’s complete proposal is made.

**I. The Filing Utilities Have Not Demonstrated that the Benefits of RTO West Exceed Its Costs**

Order 2000 addressed cost-benefits only on a national level. The Commission did not explicitly capture the costs of RTO formation or the cost of rate incentives for RTO formation. ICNU and the DSIs note, however, that DOE concluded that:

The potential for cost shifts is among the most significant obstacles to RTO formation because cost shifts translate into “negative RTO benefits” in service areas to which costs are being shifted. End use consumers in those service areas will view formation of an RTO unfavorably unless other positive

RTO benefits demonstrably outweigh the cost shifts, or unless cost shifts can be minimized.

DOE Comments at 12.

RTO West hopes to avoid initial transmission-cost shifts by the mechanism of Company Rates, but it has taken no action to avoid cost shifts due to changing power-market prices. Nonetheless, RTO West will have new costs and end-users will view RTO West unfavorably unless positive RTO benefits demonstrably outweigh these new costs. RTO West has not sponsored a cost-benefits analysis as part of its filing.

ICNU and the DSIs are very concerned about the balance of the costs involved with implementing the proposed RTO West and the benefits realized from RTO West. ICNU and the DSIs believe that the filing utilities have understated the costs of RTO West and overstated the benefits. Further, due to the design of the pricing proposal, many of the benefits of RTO West accrue to entities and loads located outside the RTO West area.

The Filing Utilities have estimated start-up costs to be \$82 million; the actual California ISO start-up costs are not in line with these estimates. Further, the expected annual operation costs of the ISO are expected to be about \$63 million per year. This estimate is slightly more than twice the size of the recently proposed increase in the annual costs for the California ISO, and is in the range of 20 percent of California ISO costs. While it can be expected that RTO West can implement operations for less than that expended by the California ISO, these estimates are extremely optimistic.

The benefits attributed to RTO West are shaky at best. The Filing Utilities claim about \$28 million dollars of regulation benefits accruing from operating a coordinated system in keeping with current NERC and WSCC load regulation standards.

However, a large majority of these benefits could be realized by the utilities without the RTO.

The demonstrable costs of \$76 million per year (O&M and amortized start-up cost) exceed the claimed benefits of \$28 million. Moreover, estimated benefits from savings in the dispatch of resources is minimal in RTO West, based on studies done for IndeGO and in the Benefits/Costs Work Group formed in the RTO West development process. Long before the Natural Energy Policy Act of 1992, Northwest Transmission Owners substantially operated the Northwest transmission grid on a “common-carrier” basis. BPA owns over 80% of the high voltage network in the Pacific Northwest and since at least BPA has been required to make surplus federal transmission capacity available to other users on a fair and non-discriminatory basis. Regional Preference Act; 16 U.S.C. § 837E (2000); Federal Columbia River Transmission System Act, 16 U.S.C. § 838d (2000). Pursuant to this direction, BPA has provided substantial wheeling services. Other Northwest utilities have voluntarily become substantial wheeling utilities, *i.e.*, built transmission to provide wheeling services rather than just to serve “native load.” In this context, the minimal economic benefits of the RTO West are not surprising. Northwest Transmission Owners have already facilitated, through historic, voluntary arrangements, the creation of a reasonably competitive energy market and, thus, the region has already captured many economic benefits that an RTO is intended to achieve.

In November 1998, the BPA Administrator reflected on the failure of IndeGo and concluded that a Northwest RTO could not be justified without a change in circumstances, including a compelling case of economic benefit:

The effort was suspended, not due to a lack of good will among the participants, but because the reasons to finish

the job were not compelling. There was the expense of startup, cost shifts among participants, and the perceived lack of region-wide economic benefit. BPA stipulated that it would need a thorough review by Congress, the administration and its customers before it could sign on. Its possible we might look at these issues in a different light if there is action at the national level driving us toward solutions that look less palatable. We also need to review the economic analyses to see how much things have changed.

Something to be Thankful For, Remarks of Judi Johansen, Bonneville Power

Administrator before the Pacific Northwest Utilities Conference Committee, November 6, 1998.

The economic circumstances have not changed. To obscure this fact, the Filing Utilities allege large benefits resulting from increased reliability due to RTO operations. The existence of these benefits was extremely controversial in the RTO West work group developing the cost and benefits analysis. No foundation was established showing how or why the transfer of operational control of transmission resulted in increased reliability to the magnitude suggested by the Filing Utilities. Also, the quantification of the financial benefit resulting from this purported increase in reliability showed an extremely wide range and was disputed. The values assigned to load interruptions were from questionable sources and not supported by evidence that had achieved any level of examination or acceptance by any regulatory authority.

Finally, separate from the question of whether benefits exist, is the question of, *who* benefits? The proposed rate design for RTO West contributes to the export of benefits out of the RTO West area. By limiting rate design to a load-based access charge, the Filing Utilities have allowed generators to escape responsibility (except transfer payments and congestion charges, if applicable and, potentially, the RTO

uplift charge) for paying for the transmission system. This, coupled with the lack of comparable treatment of loads outside the RTO West area, allows generators to export their output to loads which also escape any payment for use of the transmission system. The result is an increase in payments by loads within the RTO West area for the benefit of loads outside the RTO West area. Therefore, loads in the RTO West area pay twice, once to establish and operate the RTO, and another time through increased market prices due to the free export of power to loads outside RTO West.

**J. The RTO West Agreement to Limit Liability is Unduly Overbroad**

The RTO West should not provide liability protections for the Filing Utilities in excess of current law. ICNU and the DSIs oppose the proposed Agreement Limiting Liability Among RTO West Participants (“Liability Limitation Agreement”) because its liability protections against end-users is overbroad. In addition, unlike the majority of the RTO West Filing, prior to this filing, the Liability Limitation Agreement was not reviewed by, nor does it reflect the concerns of, regional non-transmission owning parties, including end use customers.

The Liability Limitation Agreement dramatically limits the liability of transmission owners. Liability Limitation Agreement, § 3.2, 5.2.1, 5.2.2, 6.2, and 7.2. The Liability Limitation Agreement includes a “no fault” liability process for transmission property damage, indemnification for bodily injury claims, and, most important to end use customers, a dramatic shifting of liability from transmission owners to the RTO West and end users. Id. § 5. When ordering the voluntary formation of RTOs, FERC did not address the issue of utility liability limitation agreements.

The Liability Limitation Agreement ensures that the RTO West cannot sue the Filing Utilities for their ordinary negligence, limits damages for gross negligence and willful conduct, and prevents the RTO West from recouping damages for its own willful or negligent conduct. Specifically, the Liability Limitation Agreement states that “[o]wners shall not be liable . . . to the RTO West or any other party for any damages whatsoever . . . .” RTO West Liability Limitation, § 5.2.1. The only exception to the blanket removal of all liability is that owners will be liable “for gross negligence or intentional misconduct, in which case the Owner shall not be liable for any special, indirect, incidental, consequential, punitive or exemplary damages.” Id. Therefore, the RTO West shall have operational control over the transmission assets of the Filing Utilities, but will not be allowed to access those resources to cover its financial obligations.

While the Liability Limitation Agreement does not protect the RTO West from suit by an aggrieved end use customer, an aggrieved end use customer may be unable to fully recoup its damages from the RTO West. For end use customers’ claims the RTO West will “maintain \$150 million of general liability insurance, and \$150 million of errors and omissions insurance.” RTO West Filing, at 88; RTO West Liability Limitation, § 9.2.1. Since the RTO West will have limited assets, and be unable to receive indemnification from the Filing Utilities, this liability insurance will provide a de facto cap on RTO West liability. Therefore, under the RTO West Filing end use customer claims will be capped at \$150 million, regardless of their actual losses involved.

The Filing Utilities state the reason for capping the RTO West liability and dramatically reducing their own potential liability is to keep insurance costs low, reduce

litigation costs and keep the RTO West financially viable. RTO West Filing, at 88. The RTO West Filing would achieve these stated goals by ensuring that a substantial portion of damages that the Filing Utilities may ordinarily be liable for are shifted to the RTO West. Any damages that end use customers will be unable to recover from either the RTO West or the Filing Utilities will be unrecoverable. These damages do not disappear, but will have to be borne by end use customers and increase their cost of doing business. FERC should not permit the Filing Utilities to completely insulate their assets, shifting potential liability away from themselves and on to end use customers. The RTO West will have operational control over the Filing Utilities transmission assets and those assets should not be immune from claims by end users.

### III. CONCLUSION

WHEREFORE, for the reasons set forth herein, ICNU and the DSIs respectfully request that the Commission:

- (1) Decline to issue a declaratory ruling until the filing is complete;
- (2) Send back the portions of the RTO West Stage 1 filing described above to the Filing Utilities with instructions to correct the above-listed legal deficiencies;
- (3) Provide an additional opportunity to protest the filing when additional portions, including but not limited to the TOA, have been filed with the Commission and approval is sought by *all* filing utilities;
- (4) When the Stage 2 filing is made, provide an opportunity for discovery and hearing; and

(5) Order such other relief as the Commission deems appropriate.

DATED this 20<sup>th</sup> day of November, 2000.

Respectfully submitted,



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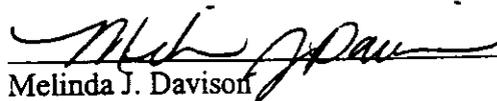
[pmurphy@mblp.com](mailto:pmurphy@mblp.com)

Of Attorneys for ATOFINA Chemicals Inc.,  
Goldendale Aluminum Co., Northwest Aluminum  
Co.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing Protest of the Industrial Customers of Northwest Utilities and the Direct Service Industries upon each party on the official service list by causing the same to be mailed, postage-prepaid, through the U.S. Mail.

Dated at Portland, Oregon, this 20<sup>th</sup> day of November, 2000.

  
Melinda J. Davison