200302195011 Received FERC OSEC 02/19/2003 11:43:00 AM Docket# RM01-12-000

Large Public Power Council

February 19, 2003

Via Electronic Filing

Magalie Roman Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, D.C. 20426

Re: Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design
Docket No. RM01-12-000

Dear Ms. Salas:

Enclosed for electronic filing in the above-captioned proceeding are the *Reply Comments of the Large Public Power Council*. A copy of the foregoing has been served upon all parties included in the Commission's service list via U.S. Mail.

Should you have any questions or need further information concerning this filing, please call me at the number below.

Sincerely,

/s/

Frank McCamant
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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMNISSION

Remedying Undue Discrimination)
Through Open Access Transmission) Docket No. RM01-12-000
Service and Standard Electricity)
Market Design)

REPLY COMMENTS OF THE LARGE PUBLIC POWER COUNCIL

INTRODUCTION AND EXECUTIVE SUMMARY

The Large Public Power Council ("LPPC") submits these reply comments pursuant to the Commission's Notice of Proposed Rulemaking ("NOPR") issued in this docket on July 31, 2002. The comments are limited in scope to a discussion of the initial comments filed by Edison Electric Institute ("EEI") seeking to expand provisions in the NOPR governing reciprocal transmission service by utilities not subject to FERC regulation ("non-jurisdictional entities" or "NJEs").[1] *See* NOPR, P. 383.

EEI's request that the Commission's proposed reciprocity rule be revised in order to require NJEs to implement all features of the proposed Standard Market Design ("SMD") tariff asks the Commission to act well beyond its jurisdiction, and to do so needlessly. It is a matter of public record that various LPPC members have either been active participants in existing ISOs, or have been closely involved in negotiations over the formation of RTOs throughout the nation. LPPC members are not unique in the public power community in this respect. The key to this participation is the fundamental

[1] *See* Initial Comments of Edison Electric Institute, pp. 24-33. EEI's position is echoed, without significant discussion, by Duke Energy Corporation (pp. 53-54) and the Industrial Consumers (pp. 116-17). .

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notion that LPPC members must be permitted to carry out the responsibilities entrusted to them by statute and public charter to reserve transmission required for native load and to determine whether RTO participation furthers the interests of their customers.

As LPPC pressed in its initial comments in this docket, it is essential that the Commission allow market participants to coalesce regionally to develop models for the promotion of competitive markets that suit regional needs. The members of LPPC are convinced that an evolutionary approach to market development, with breathing room for regional differences, is far more likely in the long run to advance the Commission's goals than a mandatory "one size fits all" national approach to these markets. LPPC notes that the Charles River Associates Study, commissioned by the Southeastern Association of Utility Regulatory Commissioners and released on November 6, 2002, underscores the fact that the costs and benefits of RTO implementation are likely to diverge in various regions of the nation, and even within subregions. LPPC members must have the flexibility to exercise their judgment to determine whether, and under what circumstances, RTO participation is beneficial for their customers.

EEI's request that NJEs be made to implement SMD tariffs as the price for access to the interstate grid should be rejected for several related reasons. First, while EEI's proposal is couched as a modification to the reciprocity rule, EEI effectively asks the Commission to treat NJEs as fully jurisdictional utilities, despite their explicit exemption from federal regulation. EEI wrongly assumes that the provision of vertically-integrated bundled service by an NJE constitutes undue discrimination and that the Commission possesses the statutory authority to affect the terms of such service. The Commission has

no such authority, and EEI's suggestion that Sections 211 and 212 of the Federal Power Act provide a new, previously undiscovered, basis for Commission action is wrong. By contrast, the approach taken in the NOPR reflects a basic equitable protocol first articulated in Order No. 888, while according needed respect to the reservation of capacity by NJEs to serve native load. In the NOPR, in provisions supported by LPPC, the Commission contemplates that an NJE should offer service employing its surplus transmission capacity to a utility from which transmission service is sought, on the same terms and conditions as that surplus is used by the NJE to serve itself. The basic principle of fairness for conditioning NJE access to transmission service cannot support EEI's request for a dramatic intrusion into non-jurisdictional matters.

Second, EEI incorrectly complains that the basic Order No. 888 reciprocity structure is unworkable in the event the Commission adopts the SMD tariff for jurisdictional utilities. LPPC sees no meaningful obstacle to complying with the commission's reciprocity rule as currently articulated.

Finally, EEI's claim that the Commission lacks a rational basis for extending the Order No. 888 reciprocity provisions in an SMD context is fundamentally flawed. The basis for the decision lies in the express statutory limitations on FERC's authority and in fundamental respect for the state-based authority of non-jurisdictional organizations. EEI's request must be rejected.

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ARGUMENT

1. EEI's argument that the Commission has reason or the statutory authority to address alleged discrimination by NJEs is incorrect.

EEI's argument (EEI at pp. 24 - 27) that the reciprocity provision in the NOPR permits NJEs to engage in undue discrimination incorrectly assumes, first, that the provision of bundled sales service by NJEs constitutes undue discrimination, and second, that the Commission has the statutory authority to address NJE activity under the Federal Power Act. EEI asserts (EEI at p.24) that the NOPR would permit "undue discrimination" by NJEs against FERC-regulated utilities. EEI further argues that: "[t]he Commission cannot rationally conclude that practices permitted under Order No. 888 are unduly discriminatory when conducted by public utilities but are not discriminatory when conducted by non-public utilities . . . ." (EEI at p. 26).

As LPPC explained at length in its November 15, 2002 Initial Comments on the NOPR, the provision of bundled sales service by members of the Large Public Power Council is simply not discriminatory. Certainly, there is no record establishing such discrimination with respect to NJEs. LPPC members are held publicly accountable through state laws and public charters to provide cost-effective, reliable service to their customers. The provision of bundled sales service is simply the most cost-effective way of satisfying the LPPC members' public mandate.[2] The LPPC members' accountability to the consuming public, and not to shareholders, is a meaningful basis for distinguishing

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[2] *See* Initial Comments of the Large Public Power Council, pp. 8 – 22.

the incentives LPPC members may have to engage in discriminatory behavior from those experienced by investor-owned utilities.

Even assuming that the Commission draws a contrary conclusion with respect to alleged discrimination in the provision of service by private, investor-owned utilities, there is no statutory basis for extending remedial action to NJEs. EEI urges a level of intrusion in the conduct of non-jurisdictional utilities far more dramatic than what was contemplated in Order No. 888 and is proposed in the NOPR. Underlying the Commission's Order No. 888 reciprocity approach was what the Commission articulated as a basic equitable concept; an NJE should not be permitted to employ a public utility's open access network without offering that utility the same opportunity.[3] So stated, the provision drew only limited opposition from the public power community.[4] In initial comments on the NOPR in this docket, LPPC was clear that it can support the formulation of the reciprocity rule articulated in the NOPR.

The revisions to the reciprocity rule that EEI now seeks would expand the comparability concept in Order No. 888 vastly beyond its original equitable boundaries. EEI asks the Commission to impose on NJEs common carrier status, calling upon them to offer open access service not only to transmitting utilities, but to any party. Even more

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[3] The Commission's regulations under Order No. 888, reiterated in the NOPR, make clear that the service to be offered by the NJE will be comparable to what the NJE provides itself. In proposed regulations governing safe harbor tariff filings, the Commission specifies: "A non-public utility may submit a transmission tariff and a request for a declaratory order that its voluntary transmission tariff provides service that is comparable to the service that a non-public utility provides itself." 18 C.F.R. § 35.35(d)(1). Compare Initial Comments in this docket of Pinnacle West Capital Corporation and Arizona Public Service Company, p. 5*, et seq*.

[4]The legality of the Commission's approach was appealed by Nebraska Public Power District in *Transmission Access Policy Study Group v. FERC,* 225 F.3d 667 (D.C. Cir. 2000), although the court held

dramatically, EEI asks the Commission to compel NJEs to turn over operational control of their transmission systems to Independent Transmission Providers. This federal taking of publicly financed assets from non-profit state and municipal owners entrusted with their management dramatically exceeds the basic equitable concept that the Commission envisioned in Order No. 888.

The Commission's authority to concern itself with undue discrimination is drawn from – and limited in scope by – the Federal Power Act ("FPA"). More specifically, the authority to remedy discrimination that the Commission proposes to exercise in the NOPR to compel the implementation of the various features of SMD lies in Sections 205 and 206 of the Federal Power Act, sections of the statute inapplicable to NJEs. The NOPR is most explicit in relying on Sections 205 and 206 in establishing the Commission's remedial authority. Summarizing the statutory basis for the NOPR, the Commission asserts:

> The primary purpose of the Federal Power Act is to curb the abusive practices by public utilities and to protect consumers from excessive rates and charges. To achieve these ends, section 205 of the Federal Power Act requires that no public utility shall 'make, or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage,' . . . . Section 206 of the Federal Power Act authorizes the Commission to investigate and remedy unduly discriminatory or preferential rules, regulations, practices or contracts . . . .

NOPR at P.100.

By definition, state and municipally-owned entities are not "public utilities," within the meaning of the FPA and are, accordingly, outside the ambit of FPA sections

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that the challenge was unripe, pending such time as an individual NJE was denied service by a jurisdictional utility on the strength of the Commission's rule. *Id.* at 698.

205 and 206. As LPPC pointed out in initial comments filed November 15, 2002, Section 201(f) of the Federal Power Act expressly prohibits FERC from regulating "a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee or any of the foregoing acting as such in the course of his official duty . . ." The law further makes clear that the Commission is prohibited from extending its authority indirectly into areas it is prohibited from regulating directly. *See Sunray Mid-Continent Oil Co. v. PC,* 364 U.S. 137, 152 (1960); *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519 (D. C. Cir. 1990).[5]

EEI incorrectly suggests (EEI at pp. 29-30) that the Commission may rely on sections 211 and 212 of the FPA in supporting an expanded reciprocity requirement. EEI invokes these sections of the statue since they are unique in authorizing the Commission to take specified action with respect to certain otherwise non-jurisdictional entities and jurisdictional entities alike. It is, however, clear that sections 211 and 212 cannot bear the weight of an order compelling utilities to file an open access tariff for common-carrier service, let alone an SMD tariff.

For good reason, the Commission does not rely upon sections 211 or 212 in endeavoring to establish its authority to mandate compliance with the provisions of the

[5] The Commission could not defend an order compelling NJE's to implement SMD on the ground that the adoption of the OATT by non-jurisdictional entities is a voluntary matter. It is well-established that regulations will not be construed to be voluntary where market conditions make non-compliance a practical impossibility. *See Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied* 485 U.S. 1006 (1988).

SMD NOPR, nor did it do so in promulgating Order No. 888. Section 211 establishes a very specific procedure for the issuance of an order mandating transmission service. The statute provides that an order directing service will be issued in case-specific circumstances, only following:

(1) application by specified parties (an electric utility, Federal power marketing agency, or any other person generating electric energy for sale or resale);

(2) notice to each affected party (including State regulatory authorities);

(3) an opportunity for a evidentiary hearing;

(4) a specific request to the transmitting utility for transmission service at least 60 days prior to application for a transmission order; and

(5) a finding by the FERC that the service is in the public interest.

Understanding the limitations of Section 211, the Commission did not rely upon it in establishing its authority to compel open access in Order Nos. 888 and 888-A.[6] Nor did the D.C. Circuit cite the provision in upholding those orders. Instead, in support of its decision to compel open access, the Commission and the Court relied upon the Commission's remedial authority under Section 206 of the Federal Power Act, as explained in the court's decision in *Associated Gas Distributors v. FERC*, [7] governing closely analogous section 5 of the Natural Gas Act. As the Commission held in Order No. 888:

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[6] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. P 31,036, *61 Fed. Reg. 21,540 (1996), clarified*, *76 F.E.R.C. 61,009* and *76 F.E.R.C. 61,347 (1996)* ("Order 888"), *on reh'g*, Order No. 888-A, FERC Stats. and Regs. P 31,048, *62 Fed. Reg. 12,274, clarified*, *79 F.E.R.C. 61,182 (1997)* ("Order 888-A")*, on reh'g*, *Order No. 888-B, 81 F.E.R.C. 61,248, 62 Fed. Reg. 64,688 (1997)* ("Order 888-B")*, on reh'g*, *Order No. 888-C, 82 F.E.R.C. 61,046 (1998)* ("Order 888-C").

[7] 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

> The court decision in *Associated Gas Distributors v. FERC* provides powerful support for our ability to order industry-wide non-discriminatory open access transmission in the electric industry as a remedy for undue discrimination . . . . AGD, which is the only decision to have addressed the Commission's authority to remedy undue discrimination by requiring open access, upheld our authority under section 5 of the NGA (the parallel section to section 206 of the FPA) to require open access in the natural gas industry. The rationale supplied by the AGD court applies equally to the FPA and our responsibility to eliminate undue discrimination in the electric industry.[8]

Responding later in the text to the assertion that the Commission lacks the authority to compel open access service on a generic basis, the Commission makes plain that its authority rests exclusively on Section 206. According to the Commission:

> We disagree with those commenters that assert that we may find and remedy undue discrimination only through case-by case adjudications . . . . The AGD court held that 'the Commission is not required to make individual findings if it exercises its section 5 authority by means of a generic rule [citing AGD 824 F.2d at 1008].[9]

Upholding this approach in *Transmission Access Policy Study Group v. FERC*, *supra,* pp. 683 - 688, the court agreed with the Commission, relying solely on the Commission's authority under FPA sections 205 and 206.

LPPC emphasizes that if the Commission were to accept EEI's invitation to expand the reciprocity requirement, an order by the Commission permitting a utility to deny access to an NJE that has not filed an SMD tariff would be in direct violation of provisions in Sections 205 and 206 prohibiting undue discrimination against the NJE. Without a statutory basis for directly addressing the terms and conditions of NJE service,

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[8] Order No. 888 at p. 31,676.

[9] Order No. 888 at p. 31,679.

an order permitting a jurisdictional utility to deny service to an NJE on the strength of the Commission's interest in regulating NJE service would be in directly discriminatory.

The conclusion that the Commission is not free to require non-jurisdictional entities to adopt an SMD tariff is reinforced by recent case law holding that the federal government may not, as a matter of constitutional law, appropriate the machinery of a state government in order to implement federal policy. In, *e,g.*, *Printz v. United States*, 521 U.S. 898, 138 L.Ed 2d 914 (1997), the Supreme Court overturned as a violation of the Tenth Amendment legislation directing state law enforcement authorities to "participate . . . in the administration of a federally enacted regulatory scheme." 138 L.Ed.2d at 925. There, the Court overturned a federal law directing state law enforcement officials to execute federally-prescribed background checks as a predicate to gun ownership. The decision in *Printz* builds on the Court's earlier decision in *New York v. United States*, 505 U.S. 144 (1992) in which the Court invalidated a federal law directing states to take title to and incur liability in connection with radioactive waste invalidated on the ground that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations." *Id.,* at 188. Similarly, in *Federal Maritime Commission v. South Carolina State Ports Authority, et al.*, 122 S. Ct. 1864 (2002), the Court recently overturned as a violation of the Eleventh Amendment administrative enforcement action taken by the Federal Maritime Commission compelling the South Carolina Ports Authority to comply with non-discrimination provisions in the Federal Shipping Act. Taken together, these decisions make it plain that the FERC would substantially overstep its authority in imposing upon

State and municipally-owned public power utilities the obligation to carry into effect Commission orders ostensibly implementing the Federal Power Act.

2. There is no equitable rule which will justify denying transmission access to NJEs that do not adopt an SMD tariff.

Bereft of a legitimate statutory basis for directly mandating NJE implementation of an SMD tariff, EEI argues: (1) that the existing reciprocity tariff provision will not work in an SMD context (EEI at p. 28); and (2) that the Commission lacks a rational basis for concluding that certain practices are not discriminatory when conducted by an NJE and discriminatory when practiced by an IOU (EEI at pp. 25 – 26; 31).

First, EEI is wrong in complaining (EEI at p. 28) that the basic Order No. 888 reciprocity structure is unworkable in the event SMD is adopted for jurisdictional utilities. EEI's principle complaint on this point appears to be that the fact an ITP will be the "transmission provider" under the SMD tariff leaves uncertain to whom an NJE would owe the obligation of reciprocal service. To the extent there is, in fact, any ambiguity, the resolution is quite clear, and certainly no stumbling block to use of the Order No. 888 reciprocity framework: the obligation owed by an NJE will be to transmitting utilities whose systems are administered by the ITP or RTO over which the NJE desires service. There is absolutely no basis in logic or law for further extending this obligation to other market participants, as EEI suggests.

Second, EEI is fundamentally mistaken in claiming that the Commission lacks a rational basis for employing the Order No. 888 reciprocity provisions in an SMD context. The basis for the decision obviously lies in the express statutory limitations on FERC's authority and in the respect the Commission appropriately owes to the state based

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authority of non-jurisdictional organizations. EEI's request for the Commission to ignore both must be rejected.

CONCLUSION

For reasons articulated above, LPPC urges the Commission to reject EEI's unsupported proposed revisions to the reciprocity rule incorporated in the NOPR. While LPPC continues to support a reciprocity rule that would require NJEs to offer other transmission-owning entities transmission service comparable to service the NJEs provide themselves; requiring NJE's to comply with all aspects of the SMD NOPR would vastly exceed the Commission's authority.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2003, I have served the foregoing document upon each person designated on the official service list in this proceeding as compiled by the Secretary of the Federal Energy Regulatory Commission.

/s/

Emma F. Hand

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