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August 25, 2003

Via Electronic Filing

Magalie Roman Salas
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Federal Energy Regulatory Commission
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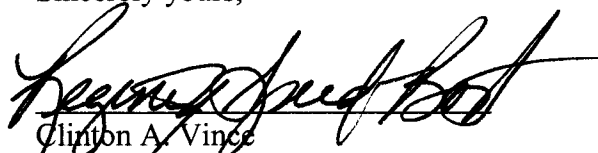
Re: Remediating Undue Discrimination Through Open Access Transmission Service
and Standard Electricity Market Design
Docket No. RM01-12-000

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 yours,



Clinton A. Vince
Regina Y. Speed-Bost
Mary E. Bengé
Attorneys for the Large Public Power Council

Enclosure
cc: Official Service List

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

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

The Large Public Power Council (“LPPC”) submits these reply comments pursuant to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) White Paper on its “Wholesale Power Market Platform” (“White Paper”) issued in this docket on April 28, 2003. These comments are limited to a discussion in support of the current application of the Commission’s reciprocity requirement for non-jurisdictional entities as reiterated in the White Paper, which contemplates the provision of service with capacity in excess of that required to meet our service obligations.¹ As explained more fully below, LPPC urges the Commission to continue its current approach toward compliance with the reciprocity requirements with capacity in excess to that needed to meet our service obligations. The current policy is a workable approach that is consistent with the status of public power under the Federal Power Act (“FPA”) and the Commission’s interest in promoting open access markets throughout the United States.

¹ *Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, Docket No. RM01-12-000, *White Paper on Wholesale Power Market Platform*, issued April 28, 2003 (“White Paper”).

Background

Order No. 888² requires non-jurisdictional entities (“NJE”) to offer transmission service in a manner comparable to the way they offer service to themselves in order to obtain transmission service from a jurisdictional entity under its Open Access Transmission Tariff (“OATT”). The Order No. 888 approach requires only that the transmission capacity in excess of what is needed to meet service obligations be made available in this manner.

In Order No. 888-A³, the Commission correctly found that it lacks jurisdiction over non-public utilities under sections 205 and 206 of the FPA. Specifically, the Commission stated its approach toward meeting the reciprocity requirements provided a “voluntary means for non-public utilities to obtain a Commission determination that they meet the reciprocity condition in the open access tariffs”⁴ and that this approach was appropriate given the section 205 and 206 limitations. The Commission’s enabling legislation has not yet changed; therefore, it should continue its approach to reciprocity outlined in its open access rule. That is, public power entities will continue to provide reciprocal service with capacity in excess of that required to meet our service obligations.

Currently, certain participants in the instant rulemaking proceeding, such as the Edison Electric Institute (“EEI”), are again advocating for an expansion of the Commission’s statutory

² *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”).

³ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order on Rehearing, 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”).

⁴ *Id.*, at p. 30,288.

jurisdiction. Under the guise of concerned market participants, EEI contends that the Commission's plan for standardized markets will not work unless it attempts to exercise jurisdiction over NJEs. The Commission, however, has chosen the approach that is consonant with the statutory structure established by Congress and confirmed by the Courts. Voluntary participation in the standardized market platform will meet the Commission's goals for restructured markets, and the Commission should continue to its course in this regard.

Comments

In this proceeding, LPPC has urged the Commission to retain its Order No. 888 approach to reciprocity by continuing to respect the rights of NJEs to reserve transmission first for their service obligations, and to continue to provide NJEs with multiple options for meeting the reciprocity requirements. These options are as follows: (1) the NJE may seek waiver of the reciprocity requirement from the jurisdictional utility from which it seeks service; (2) if denied service by the jurisdictional utility on the grounds that it does not provide reciprocal service, the NJE may bring a complaint at the Commission, and in order to prevail, the NJE must demonstrate that it does provide reciprocal service; or (3) the NJE may submit an OATT to the Commission seeking a declaratory order that the OATT meets the reciprocity requirement. Compliance with any of the above-listed methods creates the legal presumption that the NJE provides reciprocal service. To challenge that presumption a Section 211 petition must be filed against the NJE demonstrating that the NJE does not provide reciprocal service. The Commission's White Paper upheld the reciprocity provisions set forth in Order 888 without reservation.⁵

⁵ White Paper at 12.

EEI requests that the Commission's proposed reciprocity rule be clarified or "strengthened" in order to require NJEs to implement all features of the proposed SMD tariff. EEI's petition is in reality a restatement of arguments made in response to Order No. 888. EEI effectively asks the Commission to treat NJEs as fully jurisdictional utilities, despite their explicit exemption from federal regulation. In doing so, EEI improperly asks the Commission to act beyond its jurisdiction. EEI's position was rejected by the Commission in 1997 and should be rejected again now.⁶

As LPPC discussed in its Initial Comments, any approach that would involve more expansive federal jurisdiction over NJEs exceeds the Commission's statutory authority and violates the Tenth and Eleventh Amendments of the United States Constitution.⁷ Specifically, 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 of any of the foregoing acting as such in the course of his official duty...."⁸ The law further makes clear that the Commission is prohibited from extending its authority indirectly into areas it is prohibited from regulating directly.⁹

⁶ Order No. 888-A, at p. 30,288-9.

⁷ LPPC does not concede that the reciprocity approach established in Order No. 888 is constitutional. That issue was reserved by the Court of Appeals for the District of Columbia Circuit as "not ripe for judicial review." See *Transmission Access Policy Study Group v. Federal Energy Regulatory Commission*, 225 F.3d 667, 698 (D.C. Cir. 2000). However, because the existing reciprocity regime has proven workable, LPPC submits that as long as it remains intact, it can be used as the platform from which SMD can be viewed.

⁸ 16 U.S.C.A. § 824(f) (2002).

⁹ See *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 364 U.S. 137, 152 (1960); *reh'g denied*, 364 U.S. 856; *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990).

EEI incorrectly asserts that the current reciprocity policy undermines RTO formation efforts. LPPC members have either been active participants in existing ISOs, or have been closely involved in negotiations over the formation of RTOs, in all regions of the nation. LPPC members support the goals of RTOs, but we operate under requirements that are not faced by public utilities. Inextricably linked to NJE participation in RTOs is the need for the Commission's continued recognition of the rights and obligations of LPPC members, including the obligation to carry out the responsibilities entrusted to them by statute and public charter to reserve transmission required for existing service obligations and to retain the use of their assets first for their customers. The Commission's current reciprocity policy respects the rights and requirements of public power to meet these responsibilities, while at the same time participating in restructured markets.

EEI wrongly assumes that the reciprocity policy endorsed in Order 888 will "hinder, if not halt altogether, the momentum that exists behind the RTO formation negotiations now underway in the West."¹⁰ By contrast, the approach articulated in Order No. 888 will serve to bolster the current momentum toward RTO development by according NJEs the needed latitude to reserve capacity to meet service obligations and to generally meet the requirements imposed upon them by their state and local governing bodies.

EEI complains that the Commission's reciprocity policy gives a competitive edge to NJEs. However, the FPA recognizes the additional obligations of public power and requires different regulatory treatment to accommodate them. The Commission's reciprocity policy is fully consistent with the statutory scheme, unlike EEI's repeated requests for a newfound encroachment into non-jurisdictional matters.

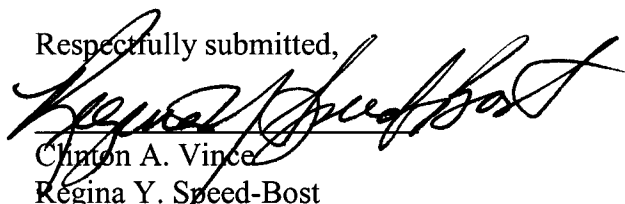
¹⁰ EEI Comments at 18.

Finally, EEI incorrectly complains that jurisdictional entities will be penalized by the Order No. 888 reciprocity structure. The current reciprocity structure provides for the fair exchange of service between NJE's and utilities from which transmission is sought. LPPC sees no meaningful obstacle to complying with the commission's reciprocity rule as currently articulated.

Conclusion

For reasons articulated above, LPPC urges the Commission to reject EEI's request for clarification of the Commission's position on reciprocity as articulated in its White Paper. As demonstrated throughout this proceeding, LPPC continues to support a reciprocity rule that facilitates voluntary participation in RTOs by public power entities – one that contemplates the provision of reciprocal service with capacity in excess of that required to meet our service obligations.

Respectfully submitted,

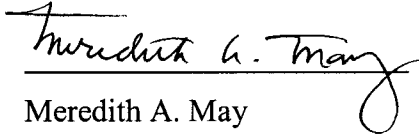


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Counsel for the Large Public
Power Council

August 25, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 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.


Meredith A. May

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