UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities	**Docket No. RM10-23-000**

INITIAL COMMENTS OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

On June 17, 2010, the Federal Energy Regulatory Commission ("Commission") issued a Notice of Proposed Rulemaking[1] in which it proposed to amend the transmission planning and cost allocation requirements established in Order No. 890.[2] The California Independent System Operator Corporation ("ISO") hereby submits its initial comments in response to the NOPR.

I. EXECUTIVE SUMMARY

As discussed below, although the ISO supports many of the Commission's objectives in the NOPR – and in particular supports the goal of reforming regional planning processes to address public policy considerations such as renewable energy policies – the ISO has serious reservations about a number of the requirements proposed in the NOPR. In particular, the ISO urges the Commission to reconsider the following proposals in the NOPR:

- The proposal to allow developers to propose an unlimited number of transmission project proposals that are unrelated to previously identified system needs;

[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities,* 131 FERC ¶ 61,253 ("NOPR").
[2] *Preventing Undue Discrimination and Preference in Transmission Service,* Order 890, FERC Stats. & Regs. ¶ 31,241 at P 418-602, *order on reh'g,* Order No. 890-A, FERC Stats & Regs. ¶ 31,261 (2007), *order on reh'g* , Order 890-B, 123 FERC ¶ 61,299, (2008) *order on reh'g,* Order 890-C, 126 FERC ¶ 61,228 (2009).

- The proposal to provide a “first come, first served” priority or property right to the first entity that proposes a particular project;

- The proposal to require system planners to abandon long-standing arrangements that establish existing transmission owners as the sole entities responsible for building transmission projects needed to address reliability issues or address other specified needs on the systems of those existing transmission owners;

- The proposal to mandate prescriptive and unduly burdensome requirements for interregional coordination agreements; and

- The proposal to require regions to develop *ex ante* rules for the allocation of the costs of all potential categories of interregional transmission projects.

The ISO believes that there is no legal basis for many of these proposals. The ISO also believes that there is no record evidence which justifies these sweeping requirements. Further, the ISO is concerned that these requirements will undermine effective planning processes.

The ISO urges the Commission to issue a final rule which eliminates those proposals that undercut effective transmission planning and exceed the Commission’s authority. In the alternative, the Commission should provide regions with sufficient flexibility in complying with the final rule to rely on processes, like the ISO’s revised transmission planning process filed in Docket No. ER10-1401, that achieve the objectives described in the NOPR, but do not necessarily follow all the specific requirements proposed in the NOPR. The ISO’s proposed revised transmission planning process constitutes a fair and balanced resolution of many of the issues raised in the NOPR and will result in a more efficient and effective planning process that optimizes benefits for ratepayers.

II. BACKGROUND

A. The Notice of Proposed Rulemaking

The Commission states that, although significant progress has been made in improving transmission planning efforts across the nation since the issuance of Order No. 890, "significant changes have taken place in the industry" which require the Commission to consider additional reforms. NOPR at P 33. The stated purpose of the NOPR is to "address remaining deficiencies in transmission planning and cost allocation processes so that the transmission grid can better support wholesale power markets and thereby ensure that Commission-jurisdictional services are provided at rates, terms and conditions that are just and reasonable and not unduly discriminatory or preferential." *Id.*

The Commission identifies the following five deficiencies in current planning processes: (1) the lack of a requirement for a regional transmission plan; (2) the lack of consideration for transmission needs driven by federal and state public policy requirements; (3) obstacles to the participation of nonincumbent transmission developers in regional planning and concerns about undue discrimination; (4) lack of coordination among transmission planning regions; and (5) existing cost allocation methodologies that may inhibit the development of cost-effective transmission, including the lack of cost allocation rate structures outside of ISO/RTO regions, and the lack of inter-regional cost allocation methodologies. NOPR at PP 34-41. The NOPR aims to address these deficiencies by imposing the following requirements: (1) all public utilities must participate in a regional transmission planning process that produces a

regional transmission plan that meets the Order No. 890 planning principles; (2) open access transmission tariffs must explicitly provide for consideration of public policy requirements established by state or federal laws or regulations in local and regional transmission planning; (3) public utilities must remove from their tariffs and all agreements subject to the Commission's jurisdiction any provisions that accord a right-of-first-refusal for incumbent transmission providers to build and own any facility identified in a regional planning process;[3] (4) all public utilities must undertake interregional planning efforts and file with the Commission an interregional planning agreement with every neighboring transmission planning region within its interconnection; and (5) every public utility must (a) have in place in its tariff a method(s) for allocating the costs of new regional transmission facilities that meet(s) specified criteria, and (b) develop with every neighboring region a mutually agreeable method(s) for allocating the costs of an inter-regional facility that is located in both regions.

B. The ISO's Revised Transmission Planning Process Proposal in Docket No. ER10-1401

Prior to the issuance of the NOPR, the ISO had already devoted substantial resources to develop a revised transmission planning process that will enable California to meet its ambitious Renewable Portfolio Standards ("RPS") and environmental goals through carefully targeted enhancements to the existing transmission planning process. This revised planning process, which will be implemented through tariff amendments pending before the Commission in

[3] This requirement would only apply to facilities that are evaluated in a regional transmission planning process and selected for inclusion in a regional transmission plan. NOPR at P 97. Also, incumbent transmission owners would have the right to build and own upgrades to their existing transmission facilities. *Id.*

Docket No. ER10-1401, effectively addresses many of the difficult issues that the Commission is currently considering in this rulemaking proceeding.

Under the revised transmission planning process, the ISO will undertake a unified planning effort that will produce a single comprehensive transmission plan for the ISO balancing authority area that includes the transmission additions and upgrades driven by public policy goals, as well as those driven by the other needs and objectives that the transmission planning process must address. To meet these objectives, the revised transmission planning process contains, *inter alia,* the following key features which are pertinent to some of the issues addressed in the NOPR. The revised planning process:

- Takes into account, as one of many significant inputs into the ISO's planning process, a statewide conceptual transmission plan developed through collaboration with other transmission planners, transmission providers, and interconnected balancing authority areas in California.

- Establishes in the ISO tariff a new category of transmission additions and upgrades, referred to as "policy-driven" transmission elements, which are needed to meet state and federal policy requirements and directives that are not inconsistent with the Federal Power Act (*e.g.,* 33 percent RPS by 2020). The tariff specifies the criteria the ISO will apply to determine whether a particular transmission element is needed for public policy reasons and allows the ISO to apply the criteria in a flexible manner.

- Provides for comprehensive transmission planning whereby the ISO works with stakeholders to identify transmission additions or upgrades needed to address public policy or economic needs which are then reflected in a transmission plan for the ISO balancing authority area in sufficient detail to elicit specific project proposals to build the needed transmission elements;

- Creates an open solicitation framework whereby all interested project sponsors, including both independent transmission developers and existing participating transmission owners, have an equal opportunity to propose to construct and own projects that

satisfy the policy-driven and economically driven transmission elements identified as needed in the ISO's transmission plan.

- Establishes a clear mechanism for choosing among competing proposals to build and own needed public-policy and economic transmission facilities and provides objective criteria, based on those used by the Public Utility Commission of Texas in similar circumstances, to use when the ISO is the entity that chooses among competing proposals;

- Retains existing tariff provisions which provide that applicable participating transmission owners are responsible for building and owning reliability-driven projects, Network Upgrades identified as needed to accommodate interconnection requests considered in the Large Generator Interconnection Procedures ("LGIP"), Location Constrained Resource Interconnection ("LCRI") facilities, and facilities needed to maintain the feasibility of allocated long-term Congestion Revenue Rights ("CRRs");

- Incorporates tariff provisions that provide that existing transmission owners are responsible for building and owning transmission upgrades and additions to and on their facilities, right-of-way, and sub-stations.

- Provides for extensive regional, sub-regional, and inter-regional coordination in connection with the ISO's transmission planning process

The ISO developed this comprehensive planning process after engaging in a lengthy and intensive stakeholder process throughout 2009 and early 2010 during which the ISO had to address some extremely complex, controversial, and polarizing issues, including several of the issues addressed in the NOPR. The ISO believes that its revised planning process addresses these issues in a fair, balanced, reasonable, and non-discriminatory manner, while (1) recognizing that the states and some federal authorities, not the ISO or the Commission, have jurisdiction over the siting, permitting, and certification of transmission facilities, (2) honoring existing transmission owner property rights and participating transmission owner service and reliability obligations, and (3) adopting an open

solicitation process which will provide new opportunities for independent transmission developers to build and own economically driven and the new category of "policy-driven" transmission projects, without any right of first refusal for existing participating transmission owners. In particular, the ISO's process establishes appropriate opportunities, obligations, and responsibilities for parties seeking to build transmission to meet needs identified by the ISO and strikes a fair balance among competing interests. The ISO's proposal is supported by the California Public Utilities Commission ("CPUC"), which stated that the "proposed [transmission planning process] revisions will significantly enhance the efficiency and coordination of the overall process of planning, permitting and developing transmission to support California's environmental and energy policy goals."[4]

The Commission's final rule in this proceeding should adopt a framework that would allow the ISO to implement its revised transmission planning process as proposed. The Commission should provide regions with sufficient flexibility in complying with the final rule to rely on processes like the ISO's revised transmission planning process that achieve the objectives described in the NOPR but do not necessarily follow all the specific requirements proposed in the NOPR. Requiring the ISO and stakeholders in California to re-consider fundamental issues related to the region's transmission planning process will result in a waste of resources, as many of the questions and controversies pending in Docket No. ER10-1401 are likely to remain no matter how much additional time is expended on re-hashing debates on the same issues. More importantly, a requirement to re-visit these fundamental issues will create

[4] CPUC Comments in Docket No. ER10-1401 at 4.

uncertainty and delay which is likely to jeopardize the expeditious efforts needed to build out the California transmission grid to ensure delivery of renewable resources to meet the State's ambitious 33 percent RPS by 2020.

III. COMMENTS

A. Need For The Reforms Proposed In the NOPR

Even assuming *arguendo* that the Commission has the legal authority to implement the sweeping reforms proposed in the NOPR, the ISO believes that the record cited in the NOPR does not provide evidence of undue discrimination or pervasive unjust and unreasonable transmission rates resulting from existing planning practices and cost allocation rules necessary to warrant the types of sweeping mandates proposed in this proceeding. As explained below, these proposed mandates have the strong potential to undermine effective and efficient planning processes in California and elsewhere in the country, introducing additional hurdles to transmission planning that appear to benefit third parties that want to build new transmission projects without any demonstrated benefits to the nation's electricity consumers. The ISO is concerned that these mandates will delay the construction of transmission facilities needed to satisfy public policy objectives and reliability requirements. In light of the potential adverse consequences of the sweeping changes proposed in the NOPR, the ISO submits that a much stronger record of undue discrimination and the existence of transmission rates that do not reflect cost-effective transmission solutions would be required.

1. Cases Cited In the NOPR Do Not Support the Conclusion That Independent Transmission Developers Are Facing Undue Discrimination

The Commission states that one of the deficiencies in the current planning processes is the existence of obstacles to non-incumbent transmission developer's participation in regional planning processes. NOPR at P 38. The Commission states that there has been concern regarding the treatment of merchant and independent transmission project developers in the planning process, in particular opportunities for undue discrimination. *Id.* In support of its conclusions, the Commission cites, *inter alia,* two incentive rate orders regarding projects that were submitted for review in the ISO's transmission planning process.[5]

Neither of these orders supports the Commission statement that independent transmission providers face undue obstacles or are being treated unfairly in the planning process. Indeed, these incentive rate orders did not even address alleged discrimination against independent transmission providers or any obstacles that independent transmission providers face, let alone provide any evidence that independent developers are being treated in an unduly discriminatory manner.

The Commission's reliance on the *Green Energy Express* order is inappropriate given that the Commission found that Green Energy Express failed to demonstrate that its project would ensure reliability or reduce the price of delivered power by reducing congestion. *Green Energy Express* at PP 27-30.

[5] *Green Energy Express LLC,* 129 FERC ¶ 61,165 (2009) ("*Green Energy Express*"); *Western Grid Development, LLC* 130 FERC ¶ 61.056 (2010) ("*WGD*").

The Commission evaluated economic and feasibility studies which Green Energy Express submitted to the ISO in support of the project and found that they did not provide the Commission with the necessary support to determine whether the project ensures reliability or reduces the price of delivered power by reducing congestion. *Id.* at P 27. The Commission stated that Green Energy Express' studies "provided minimal and inconclusive details as to whether the Project would reduce transmission congestion" and that "the presentation of the data makes it unclear if the projected cost savings are an accurate representation given the somewhat arbitrary nature of the four-week sample period."*Id.* at P 28. Accordingly, the Commission concluded that Green Energy Express failed to provide the Commission with the necessary support to determine whether the project ensures reliability or reduces the price of delivered power by reducing congestion. *Id.* at P 30.

The Commission affirmed these findings in an order denying Green Energy Express' request for rehearing.[6] Indeed, the Commission expressed concern that Green Energy Express' project would actually increase congestion during the summer months. *Rehearing Order* at P 19. The Commission also stated that Green Energy Express' reliability analysis was "not sufficiently robust to enable the Commission to find that the project ensures reliability." *Id.* at P 22.

It is difficult to fathom how the Commission's order in that case can serve as a legitimate basis for concluding that the changes proposed in the NOPR are necessary to remove obstacles that independent transmission developers face.

Likewise, the *WGD* order does not support the proposed conclusions

[6] *Green Energy Express LLC,* 130 FERC ¶ 61,117 at PP 17-30 (2010).

concerning undue discrimination against independent developers in the NOPR. The Commission's *WGD* order did not in any way suggest that Western Grid Development was treated in a discriminatory manner. Indeed, similarly to the *Green Energy Express* orders, the Commission found that "Western Grid has not provided the Commission with the necessary support to determine whether the Projects ensure reliability or reduce the price of delivered power by reducing congestion." *WGD* at P 70. The Commission went on to conclude:

> Western Grid offers no indication of the broader impacts that the Projects or energy storage devices will have on the CAISO system. Moreover, Western Grid provides no substantive analysis or evidence of reduced congestion or costs, nor does it identify the reliability issues that the Projects are proposed to address or sufficiently demonstrate reliability improvements

Id. Although the ISO in that proceeding raised concerns about applying transmission rate treatment to energy storage projects, the ISO's concerns simply echoed conclusions that the Commission itself had reached in another case involving incentive rate treatment for proposed energy storage projects.[7] Nothing in the Commission's *WGD* order suggested that raising legitimate policy issues based on the best available precedent at the time could be construed as discrimination against the project developer.[8]

Although the Commission cites these two cases as supporting the need for the sweeping reforms it proposes, the Commission's findings in *Green Energy*

[7] *See Nevada Hydro,* 117 FERC ¶61,204; *see also Nevada Hydro II,* 122 FERC ¶ 61,272

[8] The ISO evaluated the merits of the eight projects submitted by WGD to address reliability needs and found that: (1) there was no need for any reliability project in three of the areas where WGD submitted projects; (2) the capital costs of two of the WGD projects were significantly higher than the costs of other reliability solutions that the ISO approved; (3) two of the WGD projects only resolved a single reliability need in the area, whereas the alternatives the ISO approved solved all of the needs in each area on a more cost-effective basis. One solution proposed by WGD is still under consideration by the ISO.

Express and the results of the ISO's evaluation of WGD's projects would not change even if the NOPR reforms were currently in effect. Thus, the *Green Energy Express* and *WGD* decisions cannot serve as a basis for the remedies proposed in the NOPR.

2. The NOPR Reforms Are Not Needed To Ensure That Transmission Will Be Built

A fundamental underpinning of the NOPR appears to be that needed transmission is not being built and, as such, the reforms proposed in the NOPR are required. As an initial matter, the ISO notes that it is the states, not the Commission, that are responsible for siting transmission, except for the Commission's backstop authority stemming from the Energy Policy Act of 2005 ("EPAct 2005"), which courts have found to be limited to circumstances where a state siting authority fails to act on a transmission siting application.[9] The NOPR reforms cannot change that reality, only legislation can. All of the regional planning in the world cannot change the basic fact that state approval is still required for new transmission and, if a proposed transmission line traverses several states, the appropriate siting authorities in every affected state must approve the line. The fact that multiple planning authorities or a regional planning process may have found the line to be needed does not -- and cannot -- ensure that the line will be approved and sited by state authorities.

In any event, the evidence in the record of this proceeding does not demonstrate that transmission development is being stymied, much less that the broad NOPR reforms must be implemented in every region of the US to ensure

[9] *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 320 (4th Cir. 2009).

that needed transmission is approved and built. In California, needed transmission is being approved and built, and the ISO has a robust planning process in place to ensure that transmission needs are identified and addressed.

The ISO notes that from 1999-2009 it has approved 526 projects for a total estimated cost of $9.7 billion. The ISO has met all identified reliability needs through its planning process, consistent with the North American Electric Reliability Corporation ("NERC") Reliability Standards for transmission planning. The ISO has approved important reliability projects such as the Jefferson-Martin transmission project and the TransBay Cable which have improved reliability in the San Francisco Bay Area. The ISO has also approved important economic projects such as the Path 15 Upgrade and the Sunrise PowerLink project which address significant congestion needs and provide other significant economic benefits to the system. Moreover, sufficient transmission capacity has been approved under current tariff provisions to enable the state's utilities to meet the 20% RPS requirement enacted by the California state legislature (but not yet the more ambitious 33% RPS requirement established by the Governor).[10]

As the ISO expects to be well documented by other comments on the NOPR, transmission is being built in other regions of the country as well.[11] While there may be some regions that still need improvements to their transmission

[10] The ISO's proposed revised planning process in Docket No. ER10-1401 will provide enhancements to make the process more efficient, further promote the approval of cost-effective transmission, and enable the ISO to effectively plan to meet the more ambitious 33% RPS goal established by the Governor of California and identify other needed transmission elements.

[11] In New England, for example, the Department of Energy has found that the region is no longer a Congestion Area of Concern. The DOE stated that "actions such as new generation resources that have come on-line in strategic locations, aggressive demand reduction programs, energy efficiency measures, and new transmission projects have eased transmission congestion" in New England. *See* http://www.oe.energy.gov/1371.htm

planning processes, there is certainly no evidence that the onerous and sweeping requirements proposed in the NOPR are necessary to ensure that appropriate transmission facilities are planned and built across the nation.

3. The Assumption That Cost-Effective Transmission Solutions Are Not Being Approved Under Existing Planning Processes Is Unfounded

The NOPR also appears to be grounded in the concept that cost-effective transmission solutions are not being approved under existing planning processes and that the reforms proposed in the NOPR are needed to address that issue. Nowhere does the NOPR provide any evidence demonstrating that existing planning processes are resulting in the broad approval of transmission projects that are not cost-effective or the failure to approve projects that are. Indeed, as discussed in greater detail in Section III.E.1, the NOPR's proposal to grant a first-come, first serve priority right to project submissions will not result in the most cost-effective transmission projects being built and will not optimize the benefits to ratepayers.

The NOPR points to no studies of proposed transmission projects that were rejected in existing transmission planning processes, but that were found by an appropriate expert to provide net economic benefits or reliability to customers. The NOPR references claims by some parties that independent transmission developers face barriers to obtaining approval for cost-effective projects. Unsupported assertions, however, are hardly evidence that cost-effective projects are not being built.

a. Existing Planning Processes Already Approve Cost-Effective Solutions To Meet Identified Needs

The NOPR fails to acknowledge the mechanisms in existing planning processes that ensure the construction of cost-effective transmission solutions. The ISO's assessment of transmission projects identifies the transmission upgrade or addition (or non-transmission solution) that best meets the ISO's needs in a cost-effective manner. Under its existing transmission planning process, for all categories of transmission, the ISO evaluates the alternatives that it identifies and which are identified by stakeholders or proposed by project sponsors (including modifications to such projects) to determine the most cost-effective solution to meet the reliability or economic need.[12] The ISO approves the most cost-effective solution to meet the need.

The ISO uses planning level costs to determine the most cost-effective option when there are multiple options for addressing a particular need. The ISO also employees an extensive Transmission Economic Assessment Methodology to evaluate the economic benefits of potential economically driven projects. Further, under its revised planning process in Docket No. ER10-1401, the ISO proposes to conduct an open solicitation for public policy and economically driven projects. The proposed criteria for evaluating competing project proposals will provide incentives for potential project sponsors to submit cost cap and other

[12] *See, e.g.,* Final California ISO Transmission Plan 2010 at 112-13, 174-75 (April 7, 2010) (Reliability Projects); Board Memorandum re Decision for Conditional Approval of the Highwind Location Constrained Resource Interconnection Facility Project, (May 8, 2009) (LCRIF Project); Board Memorandum Re Decision on Fresno Reliability Transmission Projects (March 17, 2010)(Reliability Projects); Board Memorandum re Decision on the Bayfront Substation Transmission Project (February 3, 2010) (Reliability Project);

cost containment measures in support of their proposals to build needed economic and public policy elements.

The ISO's existing planning process and the revised planning process also provide the ISO with the ability to evaluate and approve interstate transmission projects if they are the most cost effective solution to an identified need and include the costs of such projects in its transmission rates. The ISO has approved new interstate transmission projects in the past, and several of its participating transmission owners have capacity entitlements in out-of-state transmission lines that have been turned over to the ISO and are recovered in the ISO's transmission rates. Thus, the additional regional and inter-regional planning mechanisms proposed in the NOPR are unnecessary.

b. State Regulators Closely Scrutinize Costs and Imposes Cost Caps on Transmission Projects

The NOPR also ignores the fact that state regulation of transmission projects is designed to ensure that only cost-effective projects receive siting approval. For example, California Public Utilities Code section 1001 provides, in pertinent part, that an electrical corporation shall not begin the construction of, or extend, any "line, plant, or system. without having first obtained from the [CPUC] a certificate that the present or future public convenience and necessity require or will require such construction." For transmission lines designed for operation at 200 kV or more, the CPUC requires the electrical corporation to obtain a Certificate of Public Convenience and Necessity ("CPCN").[13]

[13] CPUC General Order 131-D, Section III.A. For lines designed to operate at any voltage between 50 kV and 200 kV, the CPUC requires the electrical corporation to obtain a Permit to Construct. *See* CPUC General Order 131-D, Section III.B.

An application for a CPCN to construct or extend transmission facilities must include "[a] statement detailing the estimated cost of the proposed construction or extension and the estimated annual costs, both fixed and operating associated therewith."[14] In evaluating the reasonableness of a proposed transmission project, the CPUC will consider various cost-related issues and assess overall project costs relative to project benefits. In the course of its CPCN proceedings, the CPUC also considers alternatives to the project being proposed.

In evaluating proposed transmission projects, the CPUC considers overall project costs. These project costs are used to calculate the net benefits of the proposed line by subtracting them from energy, reliability and other benefits expected to be provided by the line.[15] When a transmission line is being proposed to meet an identified reliability need, the net benefits calculation is used to compare the line with alternatives to determine the most cost-effective means for meeting the need.[16] These alternatives can include different routes for the

[14] CPUC Rules of Practice and Procedure, Rule 3.1(f).
[15] *See e.g., Sunrise Powerlink Transmission Project* Decision 08-12-058, mimeo at 139; *see also Devers-Palo Verde No. 2 Transmission Line Project* ("*DPV2 I*"),Decision 07-01-040, mimeo at 11; *Otay Mesa Power Purchase Agreement Transmission Project* ("*Otay Mesa*"), Decision 05-06-061, mimeo at 63-65, 74 (Findings of Fact 21); *Valley-Rainbow Interconnect Project* ("*Valley-Rainbow*"), Decision 02-12-066 mimeo at 69-70; *Miguel-Mission 230 kV #2 Project*, Decision 04-07-026, mimeo at 22-33, 27 (Findings of Fact 13).
[16] *See e.g., Sunrise*, Decision 08-12-058, mimeo at 139.

proposed line,[17] new generation resources,[18] and/or different transmission lines being proposed by other entities.[19]

In cases where the CPUC determines that a project is not needed to meet an identified reliability need, a net benefits analysis is used to determine if the project should be approved on economic grounds.[20] If the CPUC determines that the project is not "cost-effective," the CPUC will not grant the electrical corporation a CPCN to construct the line.[21]

Project costs are also used by the CPUC to set a maximum cost for the project (*i.e.*, cost cap). For all transmission projects estimated to cost more than $50 million, the CPUC is required to establish a maximum cost for the project that the electrical corporation may seek to recover in rates:

> Whenever the [CPUC] issues to an electrical . . . corporation a certificate authorizing the new construction of any addition to or extension of the corporation's plant estimated to cost greater than fifty million dollars ($50,000,000), the [CPUC] shall specify in the certificate a maximum cost determined to be reasonable and prudent for the facility. The [CPUC] shall determine the maximum cost using an estimate of the anticipated construction cost, taking into consideration the design of the project, the expected duration of construction, an estimate of the effects of economic inflation, and any known engineering difficulties associated with the project.[22]

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[17] *See, e.g.*, *Jefferson-Martin 230 kV Transmission Project* ("*Jefferson-Martin*"), Decision 04-08-046; *Tehachapi Renewable Transmission Project (Segments 4 through 11)* ("*Tehachapi*"), Decision 09-12-044; *Northeast San Jose Transmission Reinforcement Project* ("*NE San Jose I*"), Decision 01-05-059, *Sunrise*, Decision 08-12-058.

[18] *Sunrise*, Decision 08-12-058, mimeo at 161-163.

[19] For example, in the *Sunrise* proceeding, the CPUC studied the Talega-Escondido/Valley-Serrano transmission project ("TE/VS") as an alternative to the Sunrise line being proposed by San Diego Gas & Electric Company ("SDG&E"). *Sunrise*, Decision 08-12-058, mimeo at 83. At the time, TE/VS was being developed by the Nevada Hydro Company.

[20] *Valley-Rainbow 500 kV Interconnect Project* ("*Valley-Rainbow*"), Decision 02-12-066, mimeo at 2.

[21] *Valley-Rainbow*, Decision 02-12-066, mimeo at 77 (Conclusions of Law 22), 78 (Ordering Paragraph 1).

[22] Cal. Pub. Util. Code section 1005.5(a).

As part of the CPCN application process, electrical corporations are required to provide an estimated cost for the transmission project[23] and have the burden of proving the reasonableness of the estimate.[24] The CPUC independently reviews the estimate and will make adjustments "even if no party challenge[s] a particular aspect of [the] estimate."[25] For example, in *NE San Jose III*, the CPUC reduced the contingency percentage proposed by Pacific Gas and Electric Company ("PG&E"), and made certain other downward cost adjustments, on the grounds that it was "excessive and [would] encourage[] PG&E to be careless about *cost containment*."[26]

This CPUC process is an example of the application of state regulations that already ensure that cost-effective transmission is being built. The NOPR does not explain why additional measures are needed to promote the construction of cost-effective transmission.[27]

B. There is No Legal Basis for Many of the Remedies Proposed in the NOPR

The ISO supports the Commission's general goal of improving planning processes to ensure that there is sufficient transmission infrastructure to achieve a cleaner, more secure, and more robust energy supply and to address other

[23] CPUC Rules of Practice and Procedure, Rule 3.1(f).
[24] *Northeast San Jose Transmission Reinforcement Project* ("*NE San Jose III*"), Decision 01-12-017, mimeo at 8
[25] *NE San Jose III*, Decision 01-12-017, mimeo at 8.
[26] *NE San Jose III*, Decision 01-12-017, mimeo at 14-21 (emphasis added).
[27] The ISO notes that certain of the NOPR reforms are intended to promote the construction of transmission projects by nonincumbent developers. In California, such developers may elect not to seek to obtain authorization to build a transmission project from the CPUC, in which case these developers will not be subject to the close cost scrutiny and monitoring of expenditures that the CPUC undertakes for public utility transmission providers, and will not be subject to the cost caps that the CPUC imposes on transmission projects over $50 million. The environmental review undertaken by other siting authorities pursuant to the California Environmental Quality Act does not involve an evaluation of costs or the imposition of cost containment measures.

public policy objectives. The ISO also is a strong supporter of regional and inter-regional planning efforts. However, certain of the sweeping requirements proposed in the NOPR, are beyond the Commission's authority and can only be implemented by Congress.

As a statutory agency, the Commission can only exercise the authority given it by Congress:[28] "[A]n agency literally has no power to act . . . unless and until Congress confers powers upon it."[29] The proposals in the NOPR exceed that authority in at least three regards: (1) the requirement that transmission owners participate in a regional planning process that produces a regional transmission plan; (2) the elimination of rights of incumbent transmission owners to build certain upgrades and new transmission facilities, which the NOPR refers to as the "right of first refusal;" and (3) the directive that transmission owners file regional and inter-regional cost allocation agreements. Regardless of any policy considerations related to these extra-jurisdictional initiatives, the Commission must obtain congressional approval before moving forward with them. The Commission should omit these proposals from the final rule.

1. The Commission Lacks the Authority to Compel Regional and Inter-regional Planning.

The NOPR proposes to (1) require public utilities to undertake regional and inter-regional planning efforts and execute inter-regional planning agreements, or (2) establish regional planning bodies that will determine what facilities should be built in a particular region. The Commission lacks the authority to compel such arrangements. Although the ISO is itself a regional

[28] *See, Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (2002) ("*Atlantic City*")
[29] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

transmission planning authority, it is the product of a *voluntary* agreement among its participating transmission owners. The Commission may well regulate the services provided by regional transmission operators and independent system operators (collectively, "ISOs/RTOs") that engage in regional transmission planning. It cannot, however, compel their formation.

Section 202(a) of the Federal Power Act[30] provides the Commission with authority to "divide the country into regional districts for the *voluntary* interconnection and coordination of facilities for the generation, transmission and sale of electric energy."[31] In *Central Iowa,* the D.C. Circuit recognized that there are various degrees and methods of regional coordination, which incudes transmission planning.[32] The decision cited a National Power Survey which noted that "[c]oordination is joint *planning* and operation of bulk power facilities by two or more electric systems for improved reliability and increased efficiency which would not be attainable if each system acted independently." *Id.* Further, the "highest degree of coordinated planning results when a group of utilities jointly plan, design, and construct their generation and transmission facilities as a single system." *Id.* Similarly, throughout the NOPR, the Commission recognizes that regional transmission planning encompasses regional coordination. *See, e.g.,* NOPR at PP 4, 39,45, 49, 50, 102, 105, 114, 116, 118

Courts have definitively interpreted Section 202 of the Federal Power Act as reflecting Congress' intent that coordination and interconnection

[30] Section references in this discussion are to the relevant portions of the Federal Power Act or Natural Gas Act unless otherwise identified.
[31] 16 U.S.C. §202(a) (emphasis added).
[32] *Central Iowa Power Coop. v. Federal Energy Regulatory Commission,* 606 F.2d 1156, n. 36 (D.C. Circuit 1979)("*Central Iowa*")

arrangements be left to the voluntary action of public utilities. Specifically, section 202 does not provide the Commission with any substantive powers "to compel any particular interconnection or technique of coordination."[33] Accordingly, the Commission lacks the authority to mandate the specific regional and inter-regional reforms proposal in the NOPR, absent the voluntary agreement if public utilities to undertake such regional coordination efforts.

In *Atlantic City,* the DC Circuit addressed the issue of whether the Commission could require its pre-approval under section 203 of the FPA before a public utility could withdraw from an ISO/RTO. The Commission contended that the word "dispose" in section 203 can be construed broadly to include the transfer of supervisory operational responsibility over facilities to the ISO/RTO. The D.C. Circuit, however, ruled that the Commission's "expansive reading of its section 203 jurisdiction cannot be reconciled with section 202, which has been definitively interpreted to make clear that Congress intended coordination and interconnection arrangements be left to the "voluntary" action of the utilities."[34]

Section 206 provides the Commission with no more authority to compel voluntary association than does section 203. In *Central Iowa*, one party argued that the Commission should have used its section 206 authority to compel greater integration of the utilities in the Mid-Continent Area Power Pool than that proposed by the utility members of the power pool. The D.C. Circuit expressly

[33] *Atlantic City,* 295 F. 3d at 12 *quoting Duke Power Co. v. Federal Power Commission*, 401 F.2d 930, 943 (D.C. Cir. 1968). *See also Central Iowa Power Coop. v. Federal Energy Regulatory Commission,* 606 F.2d 1156, 1167-68 (D.C. Circuit 1979).

[34] *Atlantic City,* 295 F. 3d at 12. The court stressed that this does not preclude the Commission from reviewing (1) ISO/RTO agreements to ensure that any entrance and exit rights specified therein are just and reasonable under Section 205 of the Federal Power Act, or (2) a specific withdrawal request under Section 205.

recognized that "Congress was convinced that 'enlightened self interest' would lead utilities to engage voluntarily in power planning arrangements, and it was not willing to mandate that they do so." *Central Iowa* at 1168. The *Central Iowa* court, recognizing that electric coordination can include, among other things, the joint planning, design and construction of transmission facilities, stated that "given the expressly voluntary nature of coordination under Section 202(a), the Commission could not have mandated adoption of the [power pool] Agreement." The court ruled that, while section 206 provided authority for the Commission to evaluate whether terms of a pooling agreement were just and reasonable, such authority "does not mean, . . . that a pooling plan is unlawful under section 206 merely because a more comprehensive arrangement might better achieve the purposes of section 202(a). To so conclude would undermine Congress's determination that coordination under section 202(a) be voluntary." *Id.* In other words, the court concluded that the Commission's authority under section 206, in light of the voluntary nature of coordination under section 202(a), does not include the authority to require modifications to require greater coordination in an otherwise just and reasonable tariff or jurisdictional agreement simply because the Commission has concluded that alternative terms and conditions would better promote the interconnection and coordination of facilities for the generation, transmission and sale of electric energy.

Thus, under the Federal Power Act, regional coordination, which includes regional transmission planning, is left to the *voluntary* efforts of public utilities. Although the ISO is a strong supporter of regional coordination, the Commission

does not have the authority to compel any specific form or technique of regional coordination. New legislation would be required to grant the Commission this authority.

2. The Commission Lacks the Authority to Dictate the Manner in Which a Public Utility Determines Construction and Ownership Rights.

The NOPR proposes to require that public utilities eliminate "rights of first refusal" from their Open Access Transmission Tariffs ("OATTs") and agreements subject to the Commission's jurisdiction with regard to facilities included in a regional transmission plan. Because the Federal Power Act does not empower the Commission to regulate the determination of construction responsibility for transmission additions and expansions, this proposal oversteps the Commission's authority.

The NOPR defines "right of first refusal" broadly to include any right of an incumbent transmission owner to construct, own and propose cost recovery for any new transmission facility located within its service territory and approved for recovery in a transmission plan. NOPR at P 20 n.21. "Right of first refusal" is not, however, an apt characterization of such rights. This is particularly true in the case of the ISO. Under the current ISO Tariff, participating transmission owners have the responsibility to construct and own approved transmission expansions or additions that are (1) reliability projects; (2) economic projects proposed by the ISO; or (3) a special category of radial generation tie lines called "location constrained resource interconnection facilities" that meet certain

criteria.[35] Under the ISO proposed revisions to its transmission planning process pending before the Commission in Docket No. ER10-1401, participating transmission owners will have the responsibility to build approved transmission expansions or additions that are (1) reliability projects; (2) location constrained resource interconnection facilities; or (3) expansions of network upgrades identified in Phase 2 studies under the Large Generator Interconnection Procedures. With the exception of the current tariff provisions concerning economic projects proposed by the ISO (which will be eliminated under the tariff revisions pending before the Commission), the participating transmission owner does not have a right to refuse to construct a facility that the ISO Tariff designates it to construct. In these comments, the ISO will therefore use the term "construction responsibility" rather than "right of first refusal."

The construction responsibility of the ISO's participating transmission owners, like that of similarly situated transmission owners throughout the nation, is the product of state-imposed service obligations dating back more that a century.[36] As discussed below, Congress, in enacting Part II of the Federal Power Act, did not intend to grant the Commission the authority to alter those responsibilities.

The Commission purports to act under section 206 of the Federal Power Act, which authorizes the Commission to regulate rates, charges, and

[35] As is true across the nation, participating transmission owners in the ISO also construct network upgrades that arise from the generator interconnection process, but the determination of which entity builds these upgrades is not part of the planning process.

[36] Under Section 451 of the California Public Utilities Code, for example, public utilities are required, *inter alia,* to furnish and maintain adequate and efficient instrumentalities, equipment and facilities as are necessary to promote the safety, health, comfort, and conveniences of its patrons and the public.

classifications "*for any transmission or sale* subject to the jurisdiction of the Commission," and "any *rule, regulation, practice or contract affecting such* rate[s], charge[s], or classification[s]." The Commission may modify any of these matters subject to its jurisdiction if the Commission determines it is "unjust, unreasonable, unduly discriminatory or preferential."[37] The Commission asserts both that the construction responsibility of incumbent transmission owners may be unduly discriminatory or preferential and that it may lead to unjust and unreasonable rates. As explained in greater detail below, neither provision supports the Commission's authority to take the proposed action. Specifically, (1) the Commission lacks authority to regulate "discrimination" in the assignment of construction responsibility; (2) even if the Commission could do so, the evidence does not support a finding of disparate treatment of similarly situated entities; (3) the Commission's proposal is not necessary to ensure just and reasonable rates.

a. The Federal Power Act Does Not Empower the Commission to Remedy What the Commission Deems "Discrimination" in the Assignment of Construction Responsibility.

Whether the Commission can act to address "discrimination" depends first on whether such the discrimination concerns a matter that may be regulated under section 206. The Commission describes the NOPR as a continuation of the reforms undertaken in Order Nos. 888 and 890. NOPR at PP 6-12. It is not. Those initiatives derived from the Commission's authority to prevent undue discrimination in access to transmission facilities. The assignment of

[37] 16 U.S.C. § 824e(a).

construction responsibility does not affect transmission access. Order Nos. 888 and 890 protected customers – loads and energy providers. The requirements proposed in the NOPR that dictate what entity can build transmission facilities identified in a regional planning process do not protect loads or energy providers. Instead, these requirements would to apply to transmission developers seeking to charge for transmission, not to loads and energy providers being charged to use transmission.

The assignment of construction responsibility is certainly not a rate, charge, or classification for transmission or sales. Rates, charges and classifications are all matters that concern the services the utility provides *to its customers*. Discrimination in such matters is discrimination among *customers*. The Commission does not even pretend to assert that the discrimination it seeks to prevent through the NOPR is discrimination among customers. Rather, it is differential treatment of potential transmission providers. Indeed, the Commission has entitled the discussion in the NOPR "Opportunities for Undue Discrimination *against Nonincumbent Transmission Developers*." NOPR at P 71 (emphasis added).

If, then, the Commission has any jurisdiction regarding the assignment of construction responsibility, it can only be if construction responsibility is a *rule, regulation, practice or contract affecting rates*. The D.C. Circuit, in *California Independent Transmission Operator v. Federal Energy Regulatory Commission*,[38] has provided the necessary guidance for determining whether construction responsibility falls into that category. Although the court was

[38] 372 F.3d 395 (D.C. Cir. 2004) ("*Cal. ISO*").

concerned with the meaning of "practices," the principles it applied are equally applicable to the other matters "affecting" rates that the Commission may regulate:

> At the first step [of a *Chevron*[39] analysis] we begin with a "plain" language" analysis of the statutory text. That is, we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." The work "practices" is a word of sufficiently diverse definitions that the only realistic approach to determining Congress's "plain meaning," if any, is to regard the work in its context. The canon of statutory construction "*noscitur a sociis*, i.e., a work is known by the company it keeps . . . is 'often applied where a word is capable of many meanings in order to avoid giving unintended breadth to the Acts of Congress."

Cal. ISO at 400 (citations omitted). The court went on to quote with approval petitioners' argument that "the intent of Congress is actually quite plain: the grant of authority to regulate rates, charges, classifications, and closely related matters." *Id.*

The treatment of "nonincumbent transmission *providers*" is not a matter "closely related" to the rates charged transmission *customers*. It is a wholly distinct matter that does not fall within the statutory language. The conclusion is consistent with the fundamental purpose of the Federal Power Act. "The primary purpose [of the Commission's review of rates] is to protect consumers from excessive rates and charges—any protection received by a utility is incidental."[40] As the *Cal. ISO* court noted, the Commission itself has interpreted "practice

[39] *Chevron U.S.A., Inc. v. FERC*, 467 U.S. 837 (1084). *Chevron* sets for the basic principles for reviewing an agency's statutory interpretations.

[40] *Me. Pub. Serv. Co. v. FPC*, 579 F.2d 659, 664 (1st Cir. 1978). *See also, e.g., FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); *Mun. Light Bds. V. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971).

. . . affecting [a] rate" as a "consistent and predictable course of conduct of the supplier that affects *[the utilities'] financial relationship with the consumer*."[41]

These conclusions are reinforced if one considers, as did the *Cal. ISO* court, precedent concerning the Interstate Commerce Act, which was the model for Part II of the Federal Power Act and which also authorized regulation of practices affecting rates. *Id.* at 403. *Interstate Commerce Commission v. Pennsylvania Railroad Co.*[42] concerned an order of the Interstate Commerce Commission directing the railroad to furnish tank cars for the transport of oil (as opposed to transporting in barrels provided by the customer). The railroad maintained a limited number of tank cars that it furnished to shippers, but the number was insufficient to meet the customers' needs. After determining that the provision of tank cars was not regulated by other portions of the Interstate Commerce Act, the Court turned to whether it was a practice affecting a rate. The Court concluded that, in the absence of specific statutory language, it could not so stretch the meaning of "practice":

> The request was for a special facility, a combination of package and car, and the question, the, is whether the neglect to provide it or to furnish it was a "practice" within the meaning of (the statute). The far-reaching effect of an affirmative answer is instantly apparent, and there must be hesitation to declare it from thee use of so inapt a word as "practice." Following a well-know rule of construction, we must rather suppose its association was intended to confine it to acts or conduct having the same purpose as its associates. And there were many such acts for which the word could provide,--practices which confused the relationship of shippers and carriers, burdened transportation, favored the large shipper, and oppressed the small one. . . Beyond that it was not necessary to go; beyond that there were serious impediments to

[41] *Cal. ISO* at 402, quoting *Mich. Wisc. Pipeline Co.*, 34 FPC 621, 626 (1965) (emphasis added).
[42] 242 U.S. 208 (1916).

> going; and we cannot but believe that if beyond that it was intended to go, there would have been explicit declaration of the intent.[43]

The Court was manifestly concerned about practices that directly related to the jurisdictional service provided customers – in that case rail transportation – not to the railroads' decisions regarding the means to provide such services. If anything, the assignment of construction responsibility is even less related to the provision of transmission service than the supply of tank cars is related to the provision of rail transportation.

The principle of *noscitur a sociis* is not the only canon of statutory interpretation compelling the conclusion that the determination of which entity constructs transmission facilities is not a practice affecting rates within the meaning of the Federal Power Act. The *Cal. ISO* court, which was considering the Commission's authority to regulate the governance of independent system operators, found it significant that the Federal Power Act authorized the Commission under section 305 of the Federal Power Act to regulate limited aspects of corporate governance, *i.e.*, interlocking directorates. The court found this to be strong evidence that Congress did not believe that it was already providing the Commission with authority over governance as a practice affecting rates under sections 205 and 206. *Id.* at 401. To determine otherwise would have made section 305 superfluous, and it is a fundamental principal of statutory construction to avoid an interpretation that renders language mere surplusage.[44]

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[43] *Id.* at 229. *See also Mo. Pac. R. Co. v. Norwood*, 283 U.S. 249, 257 (1931).

[44] *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001). Also, as discussed above, any interpretation of other more general provisions of the FPA as giving the Commission the authority to compel the specific techniques of regional and inter-regional coordination contemplated in the NOPR would inappropriately render the provisions of Section 202 of the FPA as mere surplusage.

A similar analysis applies regarding the assignment of construction responsibility if one considers the Natural Gas Act, which was enacted contemporaneously with Part II of the Federal Power Act and is interpreted in parallel with the Federal Power Act.[45] Sections 4 and 5 of the Natural Gas Act[46] provide the Commission with the same authority regarding pipeline rates that sections 205 and 206 provide the Commission regarding transmission rates. Nonetheless, Congress specifically authorized the Commission under section 7 of the Natural Gas Act to regulate construction of natural gas pipelines through certificates of public convenience and necessity,[47] a type of authority notably absent from the Federal Power Act. If Congress had intended sections 4 and 5 (and hence sections 205 and 206) to provide the Commission with authority over construction, there would have been no reason to enact section 7. Similarly, section 402 of the Transportation Act of 1920 (superseded by 49 U.S.C. § 10901 (2010)), which provided the Interstate Commerce Commission with approval authority for railway extensions, would not have been necessary if "practices affecting . . . rates included construction decisions. It is also significant that Congress, in its deliberations on the Federal Power Act, rejected provisions that would have given the Commission the authority to order a utility to fix the services, equipment, or facilities it is responsible for maintaining if the Commission were to find that they have not been properly maintained.[48]

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[45] *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332, 341 (1956).
[46] 15 U.S.C. §§ 717c, 717d (2010).
[47] 15 U.S.C. § 717f (2010).
[48] *See Duke Power* at 943 n.106. Although the statutory interpretations of later Congresses is not determinative of the statutory intent of an earlier Congress, it is informative that when Congress granted backstop siting authority to the Commission in the Energy Policy Act of 2005, it established clear limits that constrain the exercise of that authority. *See* 16 U.S.C. § 824p (2010);

It is thus apparent that Congress, in enacting Part II of the Federal Power Act, did not intend that the authority to regulate a "practice . . . affecting [a] rate" would include a utility's determination of construction and ownership rights. Moreover, the Commission cannot evade that limitation by asserting that it is regulating the rates of a regional planning body, such as an independent system operator or regional transmission organization. A transmission owner does not lose its separate identity and rights by joining an ISO/RTO. It is the transmission owners, not the ISO/RTO, that make investments in facilities, build them and maintain them. It is incumbent transmission owners with native load that have service obligations under state law, not the ISO/RTO. It is the member transmission owners of an ISO/RTO that have transmission revenue requirements to be recovered, not the ISO/RTO. The rates for transmission service under an ISO/RTO tariff are merely a product of the rates of its member transmission owners. For example, each of the ISO's participating transmission owner's files its transmission revenue requirement with the Commission under section 205, and the ISO's transmission access charge is a function of those transmission revenue requirements.

An individual transmission owner in an ISO/RTO has the right under section 205 to file rates designed to recover their investments in transmission assets. *See Atlantic City* at 9. Inherent in that right is to make investments (subject, of course, to relevant state laws). By proposing to require that all

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Piedmont Envtl. Council v. FERC, 558 F.3d 304 (4th Cir. 2009). Similarly, Section 1211 of the EPAct 2005 expressly state that the new electric reliability provisions do not authorize the Commission to order the construction of additional transmission facilities. 16 U.S.C. § 824o(i)(2). These provisions would have served no purpose if Commission already had authority over transmission construction decisions.

parties have equal opportunity to construct projects included in a regional transmission plan, the Commission is proposing to limit a transmission owners' ability to invest in new transmission assets in its service territory. This the Commission cannot do. As discussed above, RTOs/ISOs are voluntary organizations. When a transmission owner *voluntarily* joins an RTO/ISO, it does not surrender its right to determine how and when to make investments in transmission. Yet when the Commission attempts to regulate the assignment of construction rights under a regional transmission plan or an ISO/RTO tariff, it is attempting to regulate the individual transmission owners' rights to determine how and when to make investments in transmission. The Commission may not do directly what it cannot do indirectly.[49] The Commission can no more require members of an ISO/RTO to surrender their right to make investments than it can require them to surrender their section 205 rights, and *Atlantic City* definitively established that the Commission cannot require surrender of section 205 rights. *Atlantic City* at 10.

Incumbent transmission owners can, of course, voluntarily relinquish some rights, as would be the case under the ISO's proposed revisions to its transmission planning process, pursuant to which the ISO would hold an open solicitation for construction and ownership of economically driven and policy-driven elements identified through the transmission planning process. This, however, is fundamentally different from a *mandate* by the Commission requiring surrender of the rights.

[49] *N. Cal. Power Agency v. FPC*, 514 F.2d 184, 189 (D.C. Cir. 1975).

It is also worth noting that the rights of incumbent transmission owners to construct and own facilities included in a regional transmission plan do not diminish the rights of other parties, such as nonincumbent transmission developers, to make and recover investments in transmission under section 205. Such parties are fully able to plan and construct new transmission facilities, subject to state siting requirements. Moreover, both the incumbent and nonincumbent would need to consider the consequences for rate recovery if the Commission were to conclude that they built unnecessary capacity and would have an incentive to reach agreement *voluntarily*. If a nonincumbent obtains approval for a transmission line, it can obtain interconnection from the ISO/RTO and, following construction, at least in the case of the ISO, could apply to become a participating transmission owner and recover costs through the ISO's transmission access charge. None of this requires that the incumbent relinquish its rights.

Echoing the Supreme Court in *Pennsylvania Railroad Company*, the *Cal ISO* court decision warned against the "parade of horribles" that might result from an expansive reading of the term "practice . . . affecting [a] rate": "[I]t would seem that [the Commission] could also dictate the choice of CEO, COO, and the method of contracting for services, labor, office space, or whatever one might imagine, assuming [the Commission] made the appropriate finding." *Cal. ISO* at 403. The Commission's proposal goes beyond these "horribles" and seeks to regulate even the decision whether to construct a facility. This is outside the Commission's powers.

b. Nonincumbent Transmission Developers are Not Similarly Situated to Existing Transmission Owners and any Perceived Discrimination is Thus Not Undue.

Even if remedying potential discrimination among transmission developers were within the Commission's powers, there would be no legal basis for Commission's proposed elimination of the assignment of construction responsibility to incumbent transmission owners. Undue discrimination is the unjustified dissimilar treatment of similarly situated entities,[50] and incumbent transmission owners are not similarly situated to nonincumbent transmission developers.

For example, the ISO's participating transmission owners with a service territory also have obligations under state law to maintain the reliability of their transmission facilities in order to ensure the continued delivery of energy to native load customers. As the California Legislature recognized in Assembly Bill 1890 – the statute that created the ISO – "[T]ransmission and distribution of electric power remain essential services imbued with the public interest that are provided over facilities owned and maintained by the state's electrical corporations." Under Section 451 of the California Public Utilities Code, public utilities are required, *inter alia,* to furnish and maintain adequate and efficient instrumentalities, equipment and facilities as are necessary to promote the safety, health, comfort, and conveniences of its patrons and the public. Commission regulations impose similar requirement. Under Sections 761 and 762 of the California Public Utilities Code, to the extent that public utilities do not maintain adequate or sufficient transmission facilities, or that additions,

[50] *See, e.g., El Paso Natural Gas Co.,* 104 FERC ¶ 61,045, at P 115 (2003).

extensions or improvements are needed to provide adequate service, the CPUC may direct public utilities to make such facility enhancements. Transmission developers not regulated by the CPUC do not have these obligations.

Indeed, unless the Commission were to relieve incumbent transmission owners of their obligations to build under filed agreements and tariffs – and could also require states to eliminate any comparable obligations under state laws and regulations – the proposed elimination of the assignment of construction responsibility would inequitably treat incumbent transmission owners. Nonincumbent transmission developers could choose to propose only the most profitable investments, ones for which they could obtain incentive rates. Although incumbent transmission owners could also propose such projects, they would also remain responsible for the more traditional and less profitable projects. Theoretically the Commission could relieve incumbents from at least their obligations to build under filed tariffs and agreements, but the ISO fails to see how that would be compatible with ensuring that necessary reliability and economic upgrades are built.

c. The Commission Cannot Justify Its Proposal as Necessary to Ensure Just and Reasonable Rates.

The Commission takes the position that assignment of the responsibility to build to incumbent transmission owners is inconsistent with the openness requirement set forth in Order No. 890 and may not result in cost-effective solutions, which in turn may result in unnecessarily high, and possibly unjust and unreasonable rates. In order to justify its proposal in this manner, however, the

Commission would need to redefine the meaning of a just and reasonable rate in a manner unsupported by either case law or the Federal Power Act.

The rates that the Commission regulates are those of the utility providing the service. Section 206 authorizes the Commission to modify rates if it finds them unjust and unreasonable. Section 206 does not authorize the Commission to assign the service to another utility because it believes the other utility will provide lower rates. Nothing in the history of the Federal Power Act, and nothing in judicial or legal precedent, suggests that the Commission has such authority, and the Commission cites no basis for such authority. If the Commission cannot take such action as a remedial measure, how can it possibly do so as a prophylactic measure?

Under existing precedent interpreting the Federal Power Act, rates are just and reasonable if they are designed to recover a utility's legitimate and prudently incurred costs; prudent costs are those the reflect reasonable decisions based on the information available to management at the time.[51] Under this principle, the Commission can review the determination to build a transmission facility, the capacity of the facility, the choice of contractors, and related matters – all to determine whether management decisions were reasonable.[52] It can disallow those costs that result from imprudent decisions.[53]

If a utility incurs its costs prudently, however, nothing in the Federal Power Act authorizes the Commission to adjust a utility's rates or to deny a utility a return of and on a prudent and necessary investment because of speculation that

[51] *See Violet v. FERC,* 800 F.2d 280 (1st Cir. 1986).
[52] *See, e.g., Kan. Gas & Elec. Co.*, 49 FERC § 61,295 (1989).
[53] *See, e.g., id.*; *Williams Natural Gas Co.*, 80 FERC § 61,408 (1997).

a different public utility might have provided the service at lower cost. Accordingly, requiring that another utility or potential utility (*i.e.,* a nonincumbent transmission developer) be allowed to provide the service cannot be deemed necessary to ensure just and reasonable rates.

Moreover, the Commission cites no evidence that eliminating an incumbent transmission owner's responsibility to build projects identified in a regional transmission plan will, in fact, produce "more cost-effective solutions." As the D.C. Circuit has observed, "Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking."[54] While the Commission may attempt to promulgate a prophylactic rule based solely on theoretical problems, it faces a significant burden in justifying the rule. When the Commission was seeking to expand its Standards of Conduct to apply to marketing affiliates, the D.C. Circuit warned of the showing that would be necessary:

> If FERC chooses to rely solely on a theoretical threat, it will need to explain how the potential danger of improper communications between pipelines and their non-marketing affiliates, unsupported by a record of abuse, justifies such costly prophylactic rules. FERC would need to explain why the individual complaint procedure . . . does not suffice to ensure that pipelines are not abusing their relationships with non-marketing affiliates. If FERC believes that the nature of the alleged misconduct renders it undetectable through normal reporting mechanisms, FERC would have to say, for example, why such evidence of abuse was detected before it adopted [the new Standards of Conduct]. . . . If FERC cites the rise of a variety of new services, mostly relating to the commodity market, it will need to elucidate how those developments relate to and justify the promulgation of costly prophylactic rules governing

[54] *Nat'l Fuel Gas Supply Corp. v. FERC,* 468 F.3d 831, 843, citing *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 42-43 (1983)

> pipelines' relationships with their non-marketing affiliates. If FERC relies on an increase in the amount of pipeline capacity held by non-marketing affiliates, it must explain how that poses a threat of actual abuse by pipelines and their non-marketing affiliates (and why the rule should also apply to affiliates that do not ship on their affiliated pipelines). If FERC chooses to extend the Standards to entities that do not hold or control capacity, the Commission would need to justify such an extension given that a stronger theoretical threat exists with respect to affiliates that hold or control capacity on affiliated pipelines than to affiliates that do not hold or control such capacity. We cannot say that any of these theoretical rationales, alone or in combination, would justify adoption of the Standards of Conduct . . . ; they merely illustrate the kind of analysis FERC would need to undertake if it attempts to support the Order based solely on a theoretical threat (that is, absent record evidence of abuse).

Id., 844-45 (D.C. Cir. 2006). No less a showing is required here, and the Commission has provided no analogous justification for its proposal.

The Commission's citation of the openness principle of Order No. 890 cannot provide the missing justification for the proposal to eliminate the responsibility to build of incumbent transmission owners. As the courts have repeatedly warned the Commission, a regulation "cannot be the basis for denying the petitioners their rights provided by a statute enacted by both houses of Congress and signed into law by the president."[55] In *Office of Consumers' Counsel v. FERC,*[56] the Commission had issued a certificate of public convenience and necessity for a synthetic gas production facility. The Commission had no jurisdiction over synthetic gas prior to its being commingled with natural gas, but relied for authority on a regulation setting forth guidelines for research, development, and demonstration projects and the assertion that its authority to regulate commingled gas provided it the power to consider all factors

[55] *Atlantic City* at 11, *cited in Cal. ISO* at 404

[56] 655 F.2d 1132

bearing on the public interest. *Id.* at 1146, 1149. The court, in considering that Commission action, responded:

> FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into factors which reasonably relate to the purpose for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful. In carrying out its statutory certification task, FERC must recognize that "a need for federal regulation does not establish FPC jurisdiction that Congress has not granted."

Id. at 1147 (citation omitted).

Openness is not itself a requirement of the Federal Power Act. It is a remedial measure adopted by the Commission to assist in ensuring that rates, terms, and conditions of transmission service are just, reasonable and not unduly discriminatory; the Commission's can only require openness to the degree it serves those goals. As discussed above, there is no basis to conclude that elimination of incumbent transmission owners' responsibility to build transmission facilities identified in a regional plan is necessary to eliminate discrimination or will promote just and reasonable rates.

The Commission's authority to regulate rates only provides it authority to look into factors that reasonably affect rates or terms of service. Under the principles of *Office of Consumer Council*, the Commission cannot use the openness principle to expand its authority. Because, as discussed above, the Commission lacks the authority to regulate the matter of construction rights as a practice affecting rates, it cannot provide itself with that authority by denominating it as necessary for openness principles enunciated in a prior

rulemaking regarding which the Commission has already accept RTO and ISO compliance filings.

Moreover, nothing in the assignment of construction responsibilities to incumbent transmission owners is inconsistent with the openness principle of Order No. 890. As described by the Commission, the openness principle will require that transmission planning meetings be open to all affected parties including, but not limited to, all transmission and interconnection customers, state commissions and other stakeholders." Order No. 890 at P 460. Openness ensures that all parties can participate in the transmission process so that the process will consider the needs of all types of participants – all loads and suppliers – and all areas. The Commission has not explained why such openness requires elimination of incumbent transmission owners' responsibility to build.

Openness ensures that ISOs/RTOs have the benefit of all available data and proposals. Eventually, however, it is the ISO/RTO that makes a decision. At that point, the need for openness (as opposed to the continuing need for transparency) is largely diminished, if not finished. Expanding the meaning of openness to include an assignment of construction responsibility serves no purpose.

3. The Commission Lacks the Authority to Require the Filing of Regional and Inter-Regional Rates

In the NOPR, the Commission proposes to require utilities, including ISOs/ RTOs, in coordination with neighboring utilities, to file cost-allocation methodologies for regional and inter-regional transmission facilities. The

required cost allocation methodologies would be set forth in a contract. As rules affecting rates, such cost allocation methodologies must be accepted by the Commission under section 205 before they can be implemented. The allocation agreements that the Commission would require through the NOPR would be new rate contracts. For example, while the ISO has a cost allocation in place for regional transmission facilities within in the ISO balancing authority area, to the extent that "region" is construed more broadly, for example to include all of California, the ISO does not have such rates in place. The ISO also has no cost allocation rules in place for inter-regional transmission facilities. The Commission's proposal goes beyond its authority because the Federal Power Act does not authorize it to require parties to enter into contracts unrelated to existing services or to compel the filing of new rates.

Under the Federal Power Act, the right to file new rates and contracts belongs to utilities, and only to utilities. The Supreme Court set forth this fundamental principle over fifty years ago:

> These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful.[57]

Thus, under section 205, utilities may file contracts or rates, or revisions of contracts or rates, with the Commission. The Commission may reject a utility's revisions if the utility does not demonstrate that the revisions are just and

[57] *United Gas Pipeline Co. v. Mobile Gas Ser. Co,* 350 U.S. 322, 338 (1956) (all rates are established initially by the natural gas companies). The Court was describing the Natural Gas Act, but the Federal Power Act and the Natural Gas Act are interpreted in parallel. *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). Discussions herein regarding sections 4 and 5 of the Natural Gas Act are thus applicable to sections 205 and 206 of the Federal Power Act, respectively.

reasonable and not unduly discriminatory or preferential. In addition, the Commission "make such orders with reference [to the proposed contract or rate] as would be proper in a proceeding initiated after it had become effective." The latter phrase refers to proceedings under section 206 of the Federal Power Act. Under section 206, if the Commission finds that a rate is unjust, unreasonable, unduly discriminatory or preferential, it may modify the rates." None of these provisions authorizes the Commission to require a utility to file a contract or rate unless the existing rate is unjust, unreasonable, or undue discriminatory or preferential.

The courts have frequently admonished the Commission for seeking to impose new rates without first determining that the existing rate is unjust, unreasonable, or undue discriminatory or preferential.[58] For example, in *Public Service Commission of New York v. Federal Energy Regulatory Commission*,[59] the utility proposed an increase in rates, but did not propose to modify the zone allocation in its rates. The Commission nonetheless found the zone differentials to be unlawful, and prescribed a different allocation. The Commission contended that it need not follow section 5 procedures (the natural gas analogue to section 206) because the utility commenced the case under section 4 of the Natural Gas Act. The court disagreed, concluding that before the Commission could modify

[58] In *Western Resource, Inc. v. Federal Energy Regulatory Commission*, 9 F.3d 1568 (D.C. Cir. 1993), the court noted, "As we complained four years ago, '[o]n four occasions in the last three years this court has reviewed Commission efforts to compromise § 5's limits on its power to revise rates. On each the court has repelled the Commission's gambit. This is number five.' . . . We now make it an even six." (Citation omitted.) *See also Tennessee Gas Pipeline Co. v. FERC,* 860 F.2d 446 (D.C. Cir. 1988); *Northern Natural Gas Co. v. FERC*, 827 F.2d 779 (D.C.Cir.1987); *Sea Robin Pipeline Co. v FERC,* 795 F.2d (D.C. Cir. 1986); *ANR Pipeline Co. v. FERC,* 771 F.2d 507 (D.C. Cir. 1985); *Panhandle Eastern Pipe Line Co. v. FERC,* 613 F.2d 1120 (D.C.Cir.1979).

[59] 642 F.2d 1335 (D.C. Cir. 1980)

the allocation method, it must find the existing method unjust, unreasonable, unduly discriminatory, or preferential. *Id.* at 1344-45. The D.C. Circuit reversed because the Commission had made no such finding.

A different *Public Service Commission of New York v. Federal Energy Regulatory Commission* case[60] arose after the Commission, in granting a certificate of public convenience and necessity under the Natural Gas Act, approved only interim rates, directing the utility to file rates under section 4 within two years of commencing service. When the pipeline filed the rates, the Commission approved them subject to a requirement that the pipeline file rates under section 4 every three years. The Commission attempted to rely on section 16 of the Natural Gas Act. The court rejected the Commission's efforts as an impermissible attempt to avoid the strictures of sections 4 and 5. *Id.* at 7. Similarly, in *Consumers Energy Co. v. FERC*,[61] the Commission directed the company to file for rate approval every at three year intervals. The Commission did not even attempt to defend the order, rather arguing that it was only requiring informational filings. The court rejected this argument, and set aside the order. *Id.* at 780-81.

The Commission proposes to require the filing of contracts establishing rules for cost allocation of regional and inter-regional facilities under section 206. Because there are no existing contracts or rates for such services, however, the Commission cannot fulfill the basis requirement of section 206 that it find existing contracts or rates unjust, unreasonable, or unduly discriminatory or preferential.

[60] 866 F.2d 487 (D.C. Cir. 1989)
[61] 226 F.3d 777 (6th Cir. 2000).

The Commission can certainly issue guidelines according to which it will determine whether future contracts or rates for regional and inter-regional facilities will be just and reasonable.[62] It can evaluate such contracts or rates if, and when, utilities seek cost recover for such facilities. It cannot, however, compel the filing of such contracts or rates at this time.

C. The ISO Supports a General Requirement that Utilities Engage in Transmission Planning for Public Policy Needs

The NOPR proposes to direct each public utility transmission provider to include in its OATT consideration of state or federal public policy requirements that may drive transmission needs. This new category of transmission projects is in addition to, and does not replace, projects that respond to reliability needs or, based on the results of economic planning studies, reduce customer costs. NOPR at P 64. The NOPR explains that transmission providers may include public policy objectives that are not specifically required by state or federal laws or regulations. The Commission seeks comments on whether public policy requirements should be considered in the transmission planning process and, if so, how planning criteria should be formulated when determining which projects should be included in a plan (flexible criteria or "bright line" metrics).

The ISO supports the consideration of state and federal public policy considerations as part of the transmission planning process. Indeed, the creation of a new category of transmission – public policy-driven elements – is a cornerstone of the ISO's revised transmission planning process pending before the Commission in Docket No. ER10-1401. The ISO agrees with the

[62] Indeed, pending legislation before Congress would require such guidelines. *See* S. 1462, American Clean Energy Leadership Act (111th Congress).

Commission that policy-driven elements are distinct from projects that meet reliability needs, provide economic benefits, or all within the other categories of transmission that are defined in the OATT.

1. The Scope of Public Policy Projects

The ISO specifically supports the NOPR proposal that state and federal policy considerations need not be required by law or regulation.[63] The tariff language proposed by the ISO provides that policy-driven elements are necessary to meet federal or state *requirements or directives.*[64] Requiring all transmission providers to restrict such projects to those required by laws and regulations could unduly confine a transmission provider's scope for indentifying needed transmission elements too narrowly. There may be binding state and federal policies that should be incorporated into a transmission provider's transmission planning process but might not be laws or regulations, such as judicial orders, regulatory decisions, or executive orders. For example, California's 33% RPS by 2020 standard is contained in a Governor's Executive Order.[65] The ISO agrees with the NOPR's recommendation that each transmission provider coordinate with stakeholders to identify the public policy requirements appropriate for inclusion in the planning process and urges the Commission to retain its proposed approach regarding the scope of federal or state policies to be considered.

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[63] *See* NOPR at P 64 ("After consulting with stakeholders, a public utility transmission provider may include in the transmission planning process additional public policy objectives not specifically required by state or federal laws or regulations.").
[64] See the ISO's June 4, 2010, filing letter in Docket No. ER10-1401-000 at 49-58.
[65] *See* http://gov.ca.gov/executive-order/11072/.

2. The Need for Flexibility

The NOPR seeks comments on whether "bright line" metrics could be established to determine what infrastructure upgrades are needed or meet state and federal policies, or whether it is possible to establish flexible criteria to use in making such decisions. *See* NOPR at P 70.

The ISO considered both approaches in its stakeholder process leading up to its tariff amendment filing in Docket No. ER10-1401 and concluded that it was necessary to develop flexible tariff criteria. By its very nature, planning transmission to implement public policy objectives requires assumptions about future developments that can be very uncertain over a long term planning horizon. Given the high cost and long lead time associated with transmission upgrades, a planner must manage such uncertainties by carefully balancing the necessity of ensuring that sufficient transmission capacity will be in service when needed, against the risk of building under-utilized or "stranded" capacity.

Moreover, the optimal balance will likely depend on the specific public policy directives being addressed, thereby making it unrealistic to develop bright-line criteria for selecting the needed policy-driven transmission elements. Assume for example, that the public policy goal is to develop the necessary infrastructure to deliver a certain level of renewable generation to load within a certain period (as is the case with California's 33% RPS by 2020 target). The transmission provider must make assumptions about the location, type, and quantity of renewable generation that is likely to be developed, as well as assumptions about additional resources needed to integrate such generation.

Varying these assumptions could cause dramatic changes to the future infrastructure needs. On the other hand, a transmission planner must consider the most efficient use of network facilities in order to prevent overbuilding and stranded investment. Planners need flexible criteria to measure and test the reasonableness and likelihood of assumptions regarding future resources so they can better balance public policy goals with the risk of stranded investment over multiple planning cycles.

The ISO's proposed tariff contains ten criteria that the ISO may use:

> …to determine the need for, and indentify such policy-driven transmission upgrade or addition elements that efficiently and effectively meet applicable policies *under alternative resource location and integration assumptions and scenarios, while mitigating the risk of stranded investment*…[66]

Depending on the specific public policy objectives being addressed, one or more of these criteria will not be applicable, or certain criteria should be weighted more than other criteria. This weighting may vary between planning cycles depending on resource developments and other factors. As such, the ISO does not specify a "bright line" test or methodology in the tariff. Application of criteria to evaluate public policy considerations in the planning process will vary depending on the particular public policy at issue. The transmission planner needs flexibility or else it will constantly be filing tariff amendments to change its criteria and methodology each and every time it considers a different public policy in the planning process. For these reasons, the ISO urges the Commission to adopt the use of flexible criteria when considering the need for transmission facilities to carry out public policy objectives.

[66] Section 24.4.6.6 of the ISO Tariff, as revised in Docket No. ER10-1401.

3. Public Policy-Driven Projects and Network Upgrades Triggered by Generation Interconnection

The ISO agrees with the statement in the NOPR that public policy-driven transmission additions, identified and approved proactively through a transmission planning process, ultimately can reduce the proportion and size of network upgrades that would otherwise be triggered through generator interconnection requests. NOPR at P 68. Whereas the attainment of public policy objectives is expected to hinge on developing transmission to access specific types and locations of supply resources, the generator interconnection process focuses narrowly on meeting the transmission needs of those generators that have progressed through specified milestones in the interconnection queue process. Adopting a public-policy-driven planning criterion will enable the system planner to look beyond the current interconnection queue to anticipate the transmission needs of future resources and resource areas. In this way, developing policy-driven transmission will reduce the role of the interconnection process as a driver of transmission development.

The ISO notes that its revised transmission planning process goes even further in this regard and explicitly provides for coordination between the annual planning process and the LGIP. The ISO has proposed tariff revisions in new Section 24.4.6.5 that permit the ISO to evaluate large LGIP network upgrades as part of its comprehensive plan, and, under certain circumstances, propose policy-driven elements that, when reflected in future LGIP studies, will obviate the need

for some LGIP-driven network upgrades.[67] The Commission should not take any actions in its final rule herein that would preclude the ISO from undertaking this type of coordination between the LGIP and transmission planning processes.

D. The Commission Should Clarify That Existing ISOs and RTOs will be Considered Regional Planners Under the Final Rule

The Commission proposes to require that each transmission provider participate in a regional transmission planning process that produces a regional transmission plan that meets all of the Order No. 890 transmission planning principles, except for the regional participation and cost allocation principles which are addressed separately. NOPR at P 50. The regional transmission planning process would consider and evaluate transmission facilities and non-transmission solutions that are proposed and develop a regional transmission plan that identifies the transmission facilities needed to meet the needs of transmission customers and stakeholders in the region. *Id.* at P 51. The Commission distinguishes a regional planning process from a local planning process in which an individual transmission provider evaluates transmission and non-transmission solutions that are proposed and develops a local transmission plan to meet the needs of its native load and transmission customers. *Id.* The NOPR does not explicitly state whether the planning processes of existing ISOs and RTOs satisfy the regional transmission planning requirement under the

[67] *See* proposed tariff section 24.4.6.5. The ISO also notes that its generation interconnection processes, both large and small, are the subject of a current stakeholder initiative. As part of that initiative, the ISO has proposed to adjust the interconnection process timeline to better align with the revised transmission planning process. *See Generator Interconnection Procedures,* July 20, 2010, Draft Final Proposal at Attachment 1. This document can be found at: http://www.caiso.com/27d9/27d91299c74670.pdf

NOPR, although the NOPR strongly implies that this is the case.[68] The Commission should clarify that previously established ISO/RTO regions will continue to be considered regions under any final rule issued in this proceeding.

The Commission has previously found that the California ISO satisfies the eleven ISO principles set forth in Order No. 888 (which includes performing operational functions such as determination of appropriate system expansions).[69] In its orders prior to ISO start-up, the Commission approved the ISO's transmission planning and expansion process noting that it "establishes a realistic and workable regime."[70] More recently, the Commission has found the ISO's transmission planning process to be compliant with the Order No. 890 planning principles.[71] Because the ISO already develops a regional transmission plan for the multiple transmission owners that comprise the ISO controlled grid, the ISO believes it satisfies the NOPR's regional planning requirement and requests that the Commission confirm the ISO's understanding that its existing planning process is a "regional planning process" as contemplated by the NOPR.

To the extent the NOPR seeks to require that regional transmission planning be undertaken – and that a regional transmission plan be developed – with a broader geographic scope than the footprint of an existing ISO or RTO, then the ISO submits that there is no legal basis for the Commission to impose such a requirement. As discussed in Section III.B.1, the Federal Power Act

[68] *See, e.g.,* NOPR at P 48 n.56 (discussing "the regional transmission planning processes that public utility transmission providers in regions outside of RTOs and ISOs have relied on to comply with certain requirements of Order No. 890").
[69] *Pacific Gas & Electric Company, et al.,* 81 FERC ¶ 61,122 at 61,435 (1997).
[70] *Pacific Gas & Electric Company, et al.,* 80 FERC ¶ 61,128 at 61,433 (1997).
[71] *California Independent System Operator Corporation,* 123 FERC ¶ 61,283 (2008), *order on reh'g and compliance,* 127 FERC ¶ 61,172 (2009).

contemplates that regional coordination be undertaken on a *voluntary* basis. Transmission owners have voluntarily agreed to coordinate on a regional basis by becoming members of ISOs and RTOs. If the NOPR contemplates requiring *involuntary* coordination on some broader scale than an existing ISO's or RTO's footprint, that goes beyond the Commission's authority under the Federal Power Act.

E. The Commission Should Eliminate Proposed Requirements That Would Alter the Roles of Existing Transmission Owners and Grant New Rights to Transmission Developers

1. The Commission Should Reject the Proposal to Grant a First-Come, First-Served Priority Right to Developers That Are the First to Submit a Project in a Regional Planning Process

The NOPR proposes to require each public utility transmission provider to participate in a regional planning process in which projects to be considered in a given planning cycle must be submitted by a single specified date to minimize the opportunity for entities to submit slight modifications to already submitted projects. NOPR at P 91. The NOPR would require that the regional planning process have a mechanism to determine which proposal the approved transmission project is most similar to, with the sponsor of the most similar project having the right to construct and own the facilities. *Id.* at P 94. If a proposed project is not included in a regional transmission plan, and the project sponsor resubmits that proposed project in a future transmission planning cycle, that sponsor would have the right to develop that project (possibly for up to a five-year period) even if others subsequently propose substantially similar projects. *Id. a*t P 95.

The Commission states that the proposed remedies are necessary to ensure that (1) there is no undue discrimination against nonincumbent transmission providers, (2) transmission planning processes are open and nonincumbent transmission providers participate in them, (3) the planning process results in cost-effective solutions being identified, and (4) needed transmission is approved and built. The ISO submits that the proposed remedies are not necessary to achieve the goals articulated in the NOPR. In particular, the framework proposed in the NOPR is not needed to ensure, nor will it ensure, that needed, cost-effective transmission is built. These proposed requirements will undercut effective and efficient transmission planning and make it more difficult for system planners to select the most cost-effective solution to meet a regional need.

The ISO believes that its proposed revised transmission planning framework offers a more effective, efficient, and fair means of achieving the Commission's goals and is more beneficial to ratepayers. In its final rule, the Commission should provide sufficient flexibility for the ISO to implement the transmission planning framework that it has proposed in Docket No. ER10-1401.

a. The First Come, First Served Priority Proposed in the NOPR Is Deeply Flawed and Will Prevent Cost-Effective Transmission Planning

The framework proposed in the NOPR is an inefficient approach to transmission planning that will have numerous negative consequences and not optimize benefits to consumers. The framework is based on the faulty premise that transmission plans can only be – or should only be – a compilation of

projects proposed by various project developers. The ISO's own experience as a system planner is completely contrary to this premise. The ISO has concluded that the most effective and efficient approach to transmission system planning is one where needs are identified first and then the system planner determines which projects best satisfy those needs. This is the approach that underlies the ISO's revised transmission planning process, and other ISOs and RTOs plan in a similar manner. The Commission has found these transmission planning process provisions just and reasonable and in compliance with the requirements of Order No. 890.[72]

Recently, the Commission approved the Southwest Power Pool's new Integrated Transmission Plan ("ITP") framework under which SPP first identifies the reliability and economic needs and then identifies the projects that meet those needs.[73] The Commission found that SPP's ITP framework constituted a proactive, comprehensive transmission planning approach that encourages the development of needed transmission facilities in a non-discriminatory manner.[74] Given these recent findings, it is unclear what the rationale is for the NOPR's proposal to permit project developers to submit any type of project for consideration even if it does not meet a need identified by the regional planner.

Allowing entities to propose projects prior to a determination of need is not an efficient or orderly planning process and is contrary to typical practices in other industries. The proposed process is comparable to a company issuing a

[72] *See, e.g., New York Independent System Operator, Inc*., 125 FERC ¶ 61,068 (2008); *ISO New England, Inc.,* 123 FERC ¶ 61,161 (2008).
[73] *Southwest Power Pool, Inc.,* 132 FERC ¶61,042 (2010) ("SPP").
[74] *SPP* at P 52.

Request for Proposals without first having identified the product or service specifications and requirements. Government agencies and private businesses typically determine their needs first and *then* solicit proposals to meet those needs. They do not provide potential contractors with an ability to force the agency or business to evaluate the relative merits of projects, services or goods that the potential contractor thinks have merit but that address no need previously identified by the relevant agency or company.

A framework such as that proposed in the NOPR, which invites submission of transmission project proposals that do not meet needs previously identified by the regional planner through an open and transparent planning and study process (including the conduct of economic planning studies to identify economic project needs), and which would confer what is essentially a new "right of first refusal" to the sponsor of an accepted proposal, would (1) add unnecessary cost, complexity and delay to the transmission planning process, (2) unduly tax the ISO's and stakeholders' limited resources, (3) divert planners from performing their primary tasks of identifying transmission needs and determining the most cost-effective projects to meet those needs, and (4) reduce the benefits of competition while offering little or no offsetting benefits to ratepayers.

The proposed requirements of the NOPR will encourage potential project developers to bombard regional planners with every conceivable transmission line, and variation thereof, just so they can stake a proprietary claim to the project if it is ever found to be needed within the next five years.[75] This will unduly drain

[75] The ISO already has more than 30 economic projects pending from its 2008 and 2009 request windows. The addition of an open window for the new category of public policy-driven

ISO/RTO resources by forcing them to conduct extensive evaluations and studies of projects that do not meet identified needs and that in fact may never be needed. It will divert ISO/RTO staff resources away from their core planning responsibilities of proactively identifying the needs of the system and developing a plan to meet those needs. Under the NOPR, planners will essentially become mere evaluators of individual projects on a case-by-case basis whether those projects are needed or not. This could force ISOs and RTOs to dramatically increase their staffing levels and overtime, and hence their costs, to study projects that are not needed – this coming at a time when ISOs and RTOs face significant pressure to reduce their costs. Likewise, the extent of the stakeholder process would be greatly expanded in order to address the significant increase in projects that would be evaluated in the transmission planning process. This will impact stakeholder resources. Nowhere does the NOPR take these adverse cost and resource impacts into consideration.

The ISO has already observed these inefficiencies in the current ISO transmission planning process, which is why the ISO has instead proposed a comprehensive planning approach that achieves all the objectives stated in the NOPR through a process that is more efficient, more effective in identifying cost-effective upgrades, and optimizes the benefits of competition for ratepayers. Under the ISO's proposal, the ISO first identifies the preferred additions and

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transmission upgrades would vastly increase the number of projects that are submitted. Similarly, in the 2009 and 2010 transmission plans, the ISO identified and evaluated 115 and 81 reliability projects, respectively. As discussed in these comments, the ISO believes that the construction and ownership of transmission projects intended to address a reliability concern on an existing transmission owner's facilities should be the responsibility of that transmission owner, not some third party. If the Commission were to allow others to build reliability projects under the framework proposed in the NOPR, the number of submitted reliability proposals would probably increase dramatically, without providing any offsetting benefits for transmission ratepayers.

upgrades to address public policy and economically driven transmission needs, and then conducts an open solicitation process for all potential project sponsors to compete to build and own such policy-driven and economically-driven projects.[76]

Under the NOPR approach, a system planner like the ISO would: (1) be forced to evaluate all submitted project proposals in a rigorous enough manner to sustain its rejection of unneeded or non-cost-effective proposals , and (2) develop complicated criteria and metrics for selecting the one winning project sponsor whose proposal is the most similar to the ISO's preferred transmission element when others have proposed similar projects that address the same need. Moreover, such selection by the ISO would need to be defended against the inevitable protests of the losing parties who have substantial economic interests, thus creating a further unnecessary encumbrance on ISO staff resources. Such protests could lead to arbitration or litigation of the question of whether a project proposed as long as five years ago is substantially similar to one adopted in a regional plan.[77] The inefficiency of using resources in this way

[76] Under the existing ISO tariff, for reliability projects the ISO identifies the reliability need first and then evaluates alternative solutions to meet that need. That approach has been highly efficient and effective, and that is why the ISO has proposed a similar approach for evaluating economic and public policy projects in Docket No. ER10-1401.

[77] Allowing a party to propose economically driven and policy-driven projects through a request window prior to a determination of need by the system planner encourages entities to propose their projects as broadly as possible (or propose numerous alternatives) in order to "stake a claim" that their project already addressed needs in the event the ISO were to determine there was a need. If multiple project sponsors were to submit similarly broad proposals, it would be difficult for the ISO to determine the scope of each project sponsor's proposal, which is problematic because the transmission solution adopted to meet a specific need identified by the ISO may not be identical to any individual proposal. This situation could only be complicated if a party proposes a project in a given planning cycle which essentially is a variation or a modification of a project proposed by a different party in a prior cycle. Allowing an entity to claim that submission of a broadly defined project will provide the proponent with some claim to superficially similar projects in the ISO's later selection of projects will only encourage project sponsors to

is obvious. Because of the incentive the NOPR approach creates for parties to submit as many proposals as possible, the ISO would be required to commit scarce resources to rigorously assess and then defend its decisions on dozens or even hundreds of project proposals that do not relate to identified needs and which ultimately are not needed.

The NOPR's first come, first-served priority right process also fails to optimize innovation and participation in the transmission planning stakeholder process and may not result in the best, most cost-effective projects being identified and submitted for consideration. If responsibility for building and owning a project found to be needed is automatically awarded to the sponsor who submitted the project (or the closest thing to it) in some type of request window, that will discourage other potential transmission developers from (1) actively participating in the planning process evaluation of that project and identifying better alternatives or modifications to the project, or agreeing to construct the project at a lower cost, or (2) submitting competing projects in subsequent planning cycles that would improve the previously proposed project or make it more cost-effective, because they would not have the right to build the project. This will discourage stakeholder input and participation in the planning process contrary to the express goals of Order No. 890 and this NOPR. The end result could be that better, more cost-effective solutions will not be identified, proposed or fully vetted during the process.

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submit every conceivable proposal to stake their claim. This promises to be an immensely contentious, resource-intensive and ultimately wasteful process.

Although, the Commission objects to the right-of-first-refusal concept, it essentially is granting a brand new "right-of-first-refusal" to every submitted project for a five-year period. This new NOPR-created right-of-first-refusal will preclude the regional planner from approving a different project sponsor to build the project even though that sponsor offers greater benefits to ratepayers compared to the original project sponsor. In contrast, the ISO's proposed transmission planning framework provides incentives for everyone to actively participate and provide quality input in the planning process, because once the ISO identifies a needed policy-driven or economically driven transmission element, all potential transmission developers, incumbents and nonincumbents alike, will have the opportunity to compete to build and own that project.

Moreover, determining the project proposal that most closely resembles the project selected by the regional planner as needed will not always be a clear-cut decision. Different project sponsors may submit nearly identical projects or projects that only have slight variations from the project the regional planner ultimately adopts. Also, different project sponsors may propose different transmission elements that are ultimately incorporated into the final project adopted by the regional planner. It is not clear which project sponsor should have the right to build the approved line in such instances, and the NOPR offers no mechanism to resolve this difficult question. This will lead to increased disputes and litigation that will unduly detract the ISO and its resources from the core planning functions of identifying system needs and determining the most cost-effective solution to meet those needs.

The Commission states that an approach that does not follow its first come, first served priority right framework may not result in cost-effective transmission solutions and will drive costs higher than necessary. The ISO believes that the NOPR proposal will, in fact, create a costly and litigious process that likely results in projects being approved that do not provide the best achievable benefits for ratepayers. Under the NOPR framework, there is no incentive or need for a project sponsor to propose any rate caps on a project, forgo any rate incentives, or agree to any other cost containment measures, because there is no competition to build a project that is needed. Rather, the sponsor whose project most closely resembles the needed facilities automatically gets to build them, even if other transmission developers could build the same facilities in a more cost-effective and beneficial manner. Even though some other sponsor might agree to a cost cap or have existing rights-of-way that could be used for the project (thereby reducing project costs), those parties will have no opportunity to compete to build the needed public policy or economic project.[78] Thus, the NOPR's approach does not ensure that the most cost-effective and beneficial transmission will be built.

[78] The Commission has not reconciled its conclusion that planning processes that do not consider and evaluate projects submitted by non-incumbents may not result in the approval of cost-effective transmission solutions and may result in projects that are developed at higher cost than necessary with its own ratemaking policies and NOPR proposals. For example, in Order No. 679, the Commission found that it was appropriate to grant a return on equity adder to stand-alone transmission companies that are not public utilities. Order No. 679 at P 221. In practice, the Commission has typically granted a 100 basis point return on equity for stand-alone transmission companies. *See, e.g., Green Energy Express LLC,* 129 FERC ¶ 61,165 at P 59 (2009); *Green Power Express, LP* 127 FERC ¶ 61,031 at P 86 (2009). This adder is not available to non-independent incumbent public utility transmission owners. Second, the Commission has found that hypothetical capital structures are an effective tool for incenting transmission and has approved hypothetical capital structures for independent transmission companies reflecting up to 60 percent equity and 40 percent debt. *See, e.g.,* 127 FERC ¶ 61,031 at P 72. Each of these incentive ratemaking tools *per se* increases the costs for projects built by the transmission

b. A Competitive Solicitation Framework Like the One Proposed by the ISO Better Achieves the Commission's Goals Than the Proposal In the NOPR

The ISO submits that a framework like its proposed revised transmission planning process in Docket No. ER10-1401 more effectively and efficiently achieves the Commission's articulated goals of ensuring the development of cost-effective transmission, providing benefits to ratepayers, optimizing participation in the transmission planning process, and ensuring opportunities for nonincumbents. Under the ISO's proposal, the ISO and stakeholders will first determine what specific needs for public policy and economic transmission there are, and then will assess which transmission (or non-transmission solutions) best meet those identified needs. This approach avoids the multitude of problems and inefficiencies discussed in the prior section. The ISO's approach will conserve resources and keep ISO costs in check because the ISO will not be forced to conduct extensive studies of projects that are not needed and do not seek to satisfy any identified need.

Once the ISO identifies the economic and public policy driven transmission elements that are needed and specifies them in the transmission plan, the ISO will then conduct an open solicitation process whereby all interested sponsors, incumbents and nonincumbents alike, can compete to build and own those economically driven and public policy driven transmission additions and upgrades. To the extent project sponsors submit proposals to

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developers that receive them compared to public utilizes that do not. The Commission's priority right approach to evaluating regional transmission projects does not assess who can build, operate, and maintain a project in the most cost-effective, timely, reliable, and financially sound way.

build the same transmission element and propose to obtain all requisite authorizations from the same siting authority, that siting authority will determine which project sponsor should build and own the needed transmission element. To the extent such competing project sponsors propose to obtain their authorizations from different siting authorities, the ISO will evaluate the project proposals based on non-discriminatory criteria specified in the tariff. Those criteria include an opportunity for a project sponsor to demonstrate the particular advantages it has or benefits it can provide compared to other project sponsors, including benefits to ratepayers that should favor its selection to build the project. This includes any cost containment measures or binding agreements to cap project costs that can be recovered through ISO transmission rates The approach proposed in the NOPR does not offer such an opportunity to achieve these benefits for ratepayers.

The ISO's proposed approach for identifying needed public policy and economic transmission additions and upgrades is based on two key design principles. The first principle is the need for a more logical, efficient, and comprehensive planning approach in which the system planner evaluates assumptions, studies scenarios, assesses needs and then determines which transmission upgrades and additions are needed based on the needs it identifies. The second principle supporting the ISO's approach is the equal opportunity for both incumbent transmission owners and independent developers to propose to build and own public policy and economic transmission facilities through an open solicitation process.

The ISO's revised transmission planning process accomplishes the goals articulated in the NOPR in a more efficient and cost-effective manner by separating the process for identifying the most cost- effective transmission upgrades and additions to meet specific needs from the process for selecting the project sponsors most suitable to build and own the identified facilities. Separating these two processes expands the role of competition and the competitive opportunities for potential project sponsors in the transmission development process, while still providing opportunities and incentives for parties to offer the most innovative and cost-effective solutions to meet transmission needs.

The ISO's proposal promotes open participation in the planning process because *all* potential developers are eligible to submit requests for economic planning studies, participate in the planning process, assist the ISO in its Phase 2 process of identifying what transmission elements are needed, recommend transmission solutions to meet identified needs, and then compete to build and own transmission elements that the ISO identifies are needed through an open solicitation process that relies on non-discriminatory criteria.[79] Second, it will ensure that *all* transmission that is needed is identified, approved, and built because it involves a comprehensive assessment of needs as opposed to a review of submitted projects on a case-by-case basis that may or may not be

[79] The ISO's proposed process is intended to provide all parties with the opportunity to contribute to a thorough and all-inclusive evaluation of system needs – both economic and policy needs. Parties that believe they have identified a particular need can, consistent with Order No. 890, request an economic planning study under the ISO tariff and, if the ISO does not identify the request as high priority, conduct it themselves and submit the results to the ISO. The ISO's proposal allows all entities to propose: (1) that certain economic and policy needs be addressed in the transmission plan, and (2) to finance, construct, and own transmission projects in response to such needs.

needed. Third, the ISO's proposal will promote the goal of cost-effective transmission and providing benefits to ratepayers because it considers as part of the selection criteria, a project sponsor's voluntary cost containment measures, including agreement to a binding cost cap, as well as any other advantages a project sponsor has or provides, including, *inter alia,* any existing right-of-way on which the project can be built. The proposed approach contemplated in the NOPR takes none of these factors into consideration.

A highly relevant illustration of the effectiveness of a competitive solicitation alternative to the request window approach is the process employed by the Public Utilities Commission of Texas ("Texas PUC") for evaluating Competitive Renewable Energy Zone ("CREZ") transmission facilities. That process did not follow a request window-type priority right process to solicit the submission of individual project proposals irrespective of any previously identified needs. Rather, the Texas PUC process first identified the applicable CREZs that should be accessed. ERCOT then determined the needed transmission facilities to access those areas through its planning process. Finally, the Texas PUC conducted an open solicitation for proposals to build the identified needed facilities. The competitive solicitation provisions of the ISO's revised transmission planning process mirrors the ECOT/Texas PUC model in these key respects.

The NOPR suggests that independent transmission providers will be less likely to participate in a planning process unless the process evaluates all projects proposed by non-incumbents. NOPR at P 88. The ISO's proposal

achieves this end by ensuring that a potential project sponsor both demonstrates a need to be met – through its participation in the needs identification steps in Phase 2 (including requesting economic studies) – and demonstrates in Phase 3 that it is the most qualified project sponsor to finance, construct, and own a facility to meet any economic or public policy need identified by the sponsor and incorporated by the ISO into the transmission plan.

The input provided by independent transmission developers during the stakeholder process that preceded the filing of the ISO's revised transmission planning process helped convince the ISO to propose an open solicitation approach rather than a request window or first, come first served priority right approach like that contemplated in the NOPR. For example, StarTrans noted that "the Texas CREZ process used an open, transparent, competitive process to attract the most innovative and cost-effective transmission projects to bring renewable energy to the rest of the system."[80] StarTrans' comments make it clear that innovative ideas will be proposed – and in fact have been proposed – in an open solicitation process. Similarly, LS Power noted in comments filed in Docket No. AD08-9 that the open solicitation approach enabled the Public Utilities Commission of Texas to approve transmission projects to deliver over 18,000 MW of renewable energy from CREZs "in a manner that is most beneficial and cost-effective to customers."[81]

[80] StarTrans January 10, 2010 stakeholder comments at 21. StarTrans also noted that "transmission owners and developers came from across the nation to bring their best transmission development ideas and skills to help Texas meet its renewable energy goals."

[81] LS Power November 23, 2009 comments in Docket No. AD09-8 at pp.20-21. LS Power noted that the transmission service provider selection process was open to all qualifying companies and provided a framework for how competitive forces could be integrated into the transmission planning process to benefit the ultimate consumer.

These comments of independent transmission developers echo the conclusions of the Public Utilities Commission of Texas. The Texas PUC stated that its process for selecting sponsors to build and own CREZ-related transmission projects "will ensure that the commission develops a transmission plan for delivering electricity from competitive renewable energy zones (CREZs) that is most beneficial and cost effective to electric consumers."[82] The Texas PUC also stated that an open selection process will provide transmission service providers with an incentive to minimize costs and provide innovative solutions.[83] The Texas PUC stressed that an open solicitation process like that being proposed by the ISO best meets the objective of constructing transmission that is most beneficial and cost-effective to ratepayers.[84]

Independent developers actively participated in the in the Texas CREZ-transmission process and some were approved as project sponsors. There is no reason to think that a similar result will not happen if the Commission were to permit the ISO to implement a similar process for public policy and economic projects. The final rule in this proceeding should not preclude that outcome.

2. The NOPR Erroneously Assumes That Independent Transmission Developers are Similarly Situated to Existing Transmission Owners for Every Type of Transmission Upgrade

[82] Order Adopting New Section 25.16 as Approved At The May 22, 2008 Open Meeting, *Rulemaking Proceeding to Amend PUC Substantive Rules Relating to Selection if Transmission Service Providers Related to Competitive Renewable Energy Zones and Other Special Projects,* Project No. 34560, at 5 (2008)
[83] *Id.*
[84] *Id.* at 14.

Although the Commission asserts that "rights of first refusal" may be unduly discriminatory,[85] the ISO believes that existing transmission owners are not similarly situated to third-party transmission developers with respect to (1) reliability projects that are needed to address identified reliability concerns on the existing transmission owner's system or enable such transmission owner to reliably serve its native load via its facilities; (2) transmission additions or upgrades to be built on the facilities, rights-of-way, or sub-stations of an existing transmission owner; (3) network upgrades identified as needed in connection with a generation interconnection request ; (4) projects needed to ensure the feasibility of released long-term financial transmission rights, and (5) projects that utilize a participating transmission owner's transmission revenue requirement as a temporary funding mechanism to expedite construction of a facility that facilitates the interconnection of remote resources and that generators pay for as they come on line (e.g., location constrained resource gen-tie interconnection facilities under the ISO's existing tariff). Accordingly, the Commission should not require the elimination of existing tariff or contract provisions which make transmission owners responsible for building and owning these types of facilities,

The ISO believes that existing transmission owners should be responsible for building and owning projects necessary to maintain reliability on their transmission systems and to serve their native load. Transmission developers are not similarly situated to existing transmission owners in this respect because the reliability problem is occurring of the transmission system of the existing

[85] NOPR at P 38.

transmission owner not the transmission developer. A transmission developer would essentially be assuming the right and the responsibility to maintain reliability on an existing transmission owner's system under circumstances where the existing transmission owner is subject to state service obligations, and NERC penalties if its system is in violation of a NERC reliability standard. The existing transmission owners also took on responsibility for building reliability projects for their respective systems as part of their agreement when they voluntarily formed the ISO.

In addition, the NOPR appropriately recognizes that third-party transmission developers should not have the right to build and own facilities on and upgrades to the facilities, right-of-way, and sub-stations of existing transmission owners.[86] This recognition is consistent with overwhelming Commission precedent and sound legal and policy reasons. Existing transmission owners and third-party transmission developers are not similarly situated in these circumstances because the third-party developers do not own the facilities or the property where the upgrade would occur. [87]

[86] NOPR at P 97.

[87] Similarly, for the reasons stated in Order No. 2003-A and as reflected in the Commission's *pro forma* LGIP tariff provisions, existing transmission owners should be responsible for building Reliability Network Upgrades and Delivery Network Upgrades to their systems in order to interconnect generation pursuant to a request submitted through a transmission provider's Large Generator Interconnection Procedures ("LGIP") and Small Generator Interconnection Procedures ("SGIP"). Some parties commenting on the ISO's revised transmission planning process pending in Docket No. ER10-1401 have suggested that independent transmission developers should have some opportunity to build network upgrades identified in a transmission provider's generator interconnection process. Based on the ISO's review of the NOPR it appears that this rulemaking only contemplates changes to a transmission provider's transmission planning process, and the Commission is not seeking to undo the provisions of Order Nos. 2003 or Order No. 2006 and change the construction and ownership obligations under the LGIP and SGIP. The NOPR does not purport to change the LGIP or SGIP, nor does it state any basis for overhauling such provisions. The Commission clearly recognized in Order No. 2003 *et seq.* and in other individual cases, that third-parties do not have the right to build upgrades to other transmission provider's

The ISO also is concerned that the NOPR ignores the inequitable treatment that the proposed requirements would impose on transmission owners that voluntarily join ISOs and RTOs vis-à-vis their counterparts that do not. The NOPR contemplates that transmission providers will continue to undertake "local" planning process for their individual service territories and footprints. NOPR at PP 64, 66. The NOPR proposes to eliminate the right-of-first refusal only for projects evaluated in a regional planning process, not a local planning process. NOPR at P 97.

Although the Commission proposes to eliminate any rights-of-first-refusal for incumbent transmission providers included in OATTs or Commission-jurisdictional agreements, in practice that mandate will only apply to transmission owners that have voluntarily entered into operating agreements with independent entities like ISOs and RTOs. These mandates will likely have little if any impact on transmission owners that have not joined ISOs and RTOs, as the facilities needed to meet the needs of such transmission owners and their customers are identified in a local planning process. These facilities include facilities within a transmission provider's service territory necessary to meet the transmission provider's native load, transmission customers, and other stakeholders. Transmission owners that are not members of ISOs and RTOs are thus able to build and own "local" transmission projects that do not go through a regional planning process simply by obtaining a certificate of public convenience and

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transmission facilities and that allowing that right would unduly fragment the system and cause reliability problems. The Commission should not expand the scope of this proceeding to undo requirements that it adopted in the LGIP and SGIP rulemaking proceedings and which the NOPR does not purport to address or change.

necessity from their state commission. They would not face competition from independent transmission developers to build such transmission projects.

In contrast, because the ISO does all of the transmission planning for the transmission facilities that have been turned over to its operational control by participating transmission owners, transmission upgrades in the ISO footprint are evaluated under a regional transmission plan. Thus, the ISO's regional transmission plan includes transmission facilities that (1) are "local" transmission facilities under the NOPR (*e.g.,* facilities located within the transmission owner's service territory necessary to address reliability needs on the transmission owner's existing system or reliably serve its customers, as well as lower voltage transmission facilities), and (2) are not otherwise subject to the NOPR's requirement regarding elimination of rights-of-first-refusal. Because the local additions and upgrades of transmission owners that have joined the ISO now become part of the ISO's regional transmission plan, those owners will face competition from independent transmission developers to build and own those facilities. If the NOPR provides that transmission owners joining RTOs and ISOs cannot even build and own those projects within their service territories necessary to maintain reliability on their system and serve their load consistent with state law requirements, it will present a strong a disincentive from joining and remaining in ISOs and RTOs.[88]

[88] Although the NOPR proposes to require all transmission owners to participate in a regional planning process – which, in theory, could place transmission owners that are not members of an ISO or RTO on a more similar footing to those that are with respect to regional planning matters – it does not appear that the NOPR intends that participation in such a regional planning process would automatically include all local reliability projects in the regional plan. More importantly, as discussed above, the ISO does not believe that the Commission has the authority to require individual transmission owners to involuntarily participate in a regional planning process in which

Although the ISO believes that elimination of all rights-of-first-refusal disadvantages public utilities that join an ISO and RTO, and thereby serves as a disincentive to ISO and RTO membership, the ISO supports the concept of system planners voluntarily opening up economic and public policy projects to competition. The ISO's revised transmission planning process in Docket No. ER10-1401 provides for an open solicitation process whereby all interested parties, independent transmission developers and incumbent utilities alike, can compete to build and own public policy and economic projects. The ISO's proposal carefully balances the interests of independent transmission developers and existing transmission owners with service territories, allows for nonincumbents to build and own transmission in a manner that maximizes the benefits of competition, mitigates the potential discrimination faced by transmission owners that join ISOs and RTOs, appropriately recognizes which types of transmission owners should be eligible to build and own certain types of transmission facilities, and should avoid the creation of disincentives for transmission owners to remain in ISOs and RTOs.

3. Existing Transmission Owners Should Be Responsible for Building and Owning Transmission Upgrades Necessary to Maintain Reliability on Their Systems

As discussed above, the proposal in the NOPR to eliminate what the Commission calls "rights of first refusal" from public utilities' OATTs and

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the regional planner can determine what projects are needed and who gets to build them. The ISO also believes that the Commission does not have the authority to allocate the costs of such projects to individual transmission owners that do not need the project, do not have an ownership interest in the project, and do not subscribe to service on the line. Even if the Commission did have the authority to mandate these proposed requirements, there is no requirement in the NOPR that an independent entity like an ISO or RTO administer the regional planning process and make the regional planning decisions.

jurisdictional agreements is beyond the Commission's jurisdiction. Even if the Commission has the authority to require the elimination of construction responsibilities, there are strong policy and practical reasons against this proposal with respect to the assignment of construction responsibility for reliability projects. The ISO strongly believes that existing transmission owners should remain responsible for building and owning all upgrades necessary to maintain reliability on their transmission systems.

a. The Right of Public Utility Transmission Owners to Build Upgrades and Additions Necessary to Maintain Reliability on Their Systems Is Closely Tied to the Obligation to Serve Load and Adequately Maintain Their Systems

Under the ISO Tariff, reliability projects are narrowly defined as the transmission upgrades or additions required to ensure system reliability consistent with all applicable reliability criteria and ISO planning standards.[89] The ISO's participating transmission owners with service territories are responsible for construction of reliability-driven projects that are located in their service territories.

Under its planning process, the ISO performs a system reliability assessment to comply with applicable NERC, Western Electricity Coordinating Council ("WECC"), and ISO reliability requirements. The focus of the reliability assessment is to identify the specific facilities that potentially may not meet reliability performance requirements during the planning horizon being studied. The ISO assesses reliability on the bulk power system by studying the performance on the following systems: the Northern California PG&E System,

[89] ISO Tariff Section 24.1.2.

which includes eight local areas in addition to the bulk system; the Southern California SCE System; and the Southern California SDG&E System. The ISO's reliability assessment identifies existing facilities where there are reliability concerns and identifies mitigation solutions for each identified facility. The ISO evaluates all feasible alternatives to address the reliability issue and approves the most cost-effective solution to resolve the problem. The ISO then directs the participating transmission owner on whose system the reliability concern exists to construct the upgrade or addition that the ISO found best meets the reliability need. Thus, the ISO is ensuring that the most-cost effective solutions are being approved to meet reliability needs.

It is important to note that reliability projects are projects that meet the identified reliability need in the most cost-effective manner. The scope of reliability projects cannot be expanded to cover public policy needs or projects that provide economic benefits. To the extent the Commission is concerned that regional planners will "fit" projects primarily designed to provide economic or public policy benefits into the reliability category of transmission to be built by existing transmission owners, that cannot happen under the ISO's planning framework.

As discussed above in connection with the Commission's legal authority, this responsibility to build reliability upgrades and additions is the corollary of the reliability obligations of participating transmission owners with service territories. Participating transmission owners with service territories are load serving entities. Under California law, such participating transmission owners have the obligation

to maintain the reliability in order to ensure the continued delivery of energy to native load customers. The reliability of transmission facilities is a key element of reliable and adequate service. Under Sections 761 and 762 of the California Public Utilities Code, to the extent public utilities do not maintain adequate or sufficient transmission facilities, or that additions, extensions or improvements are needed to provide adequate service, the CPUC may direct public utilities to make such facility enhancements.

Participating transmission owners have been designated as the sole builders of reliability driven projects under the ISO tariff since the ISO commenced operations in the 1990s.[90] This is a pillar upon which the participating transmission owners' *voluntary* agreement to form the ISO was based. As the founding participating transmission owners indicated in their submissions to the Commission regarding the formation of the ISO:

> Reliability-driven projects would remain the responsibility of the transmission owners who would ensure that such expansions meet grid requirements consistent with applicable reliability criteria.[91]

The final rule in this proceeding should not undermine this. Providing a third-party transmission developer with the responsibility for constructing and maintaining facilities whose sole function is to maintain reliability on another transmission owner's system would essentially cede control over long-term reliability in the transmission provider's service territory to the third party. The

[90] *See* Section 3.2 of the ISO Tariff filed with the Commission in 1997 and accepted by the Commission in *Pacific Gas and Electric Co., et al.*, 80 FERC ¶ 61,128, at 61,433-35 (1997).
[91] *Pacific Gas and Electric Co., et al.*, 77 FERC ¶ 61,204, at 61,802 (1996). In a subsequent order regarding ISO start-up, the Commission again recognized the ISO's ability to propose and transmission expansion it deems necessary for reliability purposes and the participating transmission owners' obligation to construct such facilities. *Pacific Gas and Electric Co., et al.*, 81 FERC ¶ 61,122, at 61,487 (1997).

Commission has previously recognized that, because transmission owners bear the risk and responsibility of reliably operating their transmission facilities and maintaining the reliability of their transmission system, they should be the ones solely responsible for building and owning necessary upgrades to their systems. The Commission has not provided any reasoned analysis to justify changing this policy.[92]

b. Allowing Third-Parties to Build Reliability Projects Could Complicate the ISO's Performance of Its Functional Responsibilities

Permitting third-parties to build transmission projects whose sole purpose is to maintain reliability on some other transmission owner's facilities also raises coordination issues and fragments the grid by increasing seams within individual transmission owner's systems. A proliferation of transmission owners responsible for maintaining reliability on the facilities of a single existing transmission owner's system could cause unnecessary and risky compartmentalization, complicate the ISO's coordination efforts, and compromise the ISO's ability to ensure compliance with applicable standards. The Commission recognized this very problem in Order No. 2003-A when it rejected the arguments that interconnection customers should be able to construct and operate Transmission Provider Interconnection Facilities and interconnection-related Network Upgrades on the transmission provider's system. Specifically,

[92] *See Cambridge Electric Light Company,* 96 FERC ¶ 61,205 at 61,874 (2001); *Virginia Electric Power Company,* 93 FERC ¶ 61,307 at 62,054 (2000), *order on re'hg,* 94 FERC ¶ 61,164 at 61,589 (2001); *Carolina Power & Light Company,* 93 FERC ¶ 61,032 at 61,072-73 (2000). The Commission has also recognized that where the interconnection of a third-party transmission provider's facilities to the facilities of an existing transmission owner requires system upgrades to maintain reliability, avoid overloads, and for other reasons, such facilities are the responsibility of the existing transmission owner. *PJM Interconnection LLC,* 102 FERC ¶ 61.277 at PP 21, 44 (2003).

the Commission stated that "such a regime would fragment the Transmission System, thereby undermining reliability."[93] The same circumstances could arise if multiple third parties are permitted to build facilities necessary to maintain reliability on a single transmission owner's system. These facilities are integrated into the existing transmission owner's system and directly affect that system; they are not radial facilities. The Commission fails to explain why its prior precedent and factual findings no longer apply.

The ISO is able to provide quick and efficient coordination of a transmission owner's system and resolve issues internal to that system by working with the transmission owner. The addition of numerous other owners and operators responsible for maintaining reliable transmission operations on that single transmission owner's system will complicate ISO coordination efforts by requiring the ISO to compartmentalize its coordination of the participating transmission owner's system among several parties. This could become problematic if emergencies arise in real-time. Also, the ISO would have to coordinate with a very large number of new transmission owners, each of whom might only own a small transmission element, to plan outages on a single transmission owner's system. This could be troublesome in instances involving system restoration, where the ISO would need to coordinate with multiple transmission owners just to get the one system up and running in a reliable manner.

c. Allowing Third Parties to Build and Own Reliability Projects Will Unduly Complicate and Delay the Evaluation And Approval of Facilities Needed to Meet Reliability Criteria

[93] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,146, at P 230 (2004) ("Order No. 2003-A").

Allowing entities other than transmission owners to be responsible for building and owning reliability driven projects may disrupt the ISO's existing transmission planning process. The ISO has assessed 196 reliability projects to address identified needs in its last two transmission planning cycles. Allowing proposals for entities other than the existing participating transmission owners to compete to build and own reliability driven projects to address the needs identified by the ISO could substantially increase the number of proposals the ISO has to review, thereby unduly complicating the process, potentially delaying projects that are needed to meet NERC reliability standards. It would increase the time and expense required for transmission planners to evaluate and approve projects (and project sponsors) to meet reliability needs.

Also, as discussed above, the ISO already evaluates feasible alternatives to meet identified reliability needs (and receives input from stakeholders in this regard as well as alternative solutions) and selects the most cost-effective alternative to meet the reliability need. The participating transmission is obligated to build the transmission solution that the ISO finds is most cost effective. Opening up these cost-effective reliability solutions to further competition raises the concerns and issues identified in these comments.

Further, to the extent sponsors submit the same basic projects, the ISO will then need to apply some type of tie-breaking criteria similar to the criteria the ISO proposes to apply in its evaluation of public policy and economic projects. That will require the submission of significant data pertaining to each project

sponsor's costs and financial, technical and physical ability to build the project in a timely, proper, and cost-effective manner. Once the ISO has selected a project sponsor, there will be an increased risk of litigation, which could further cause construction of vital facilities to be stalled. That risk does not exist today because participating transmission owners are responsible for building reliability projects within their service territories. For reliability projects that are needed within a short period of time, any additional delays resulting from a competitive evaluation process could result in needed projects not being approved in time to meet the identified reliability need.

4. Existing Transmission Owners Should Be Responsible for Building and Owning All Upgrades and Additions on and to Their Existing Facilities, Rights-of-Way or Within an Existing Sub-station

Although the NOPR proposes to require public utilities to eliminate from their OATTs any assignment of construction responsibility to incumbent transmission owners, the NOPR also proposes an exception for upgrades to the incumbent transmission owner's existing facilities. NOPR at P 97. As discussed above, the ISO believes that elimination of incumbent transmission owners' construction responsibility is both beyond the Commission's authority and unsound policy. If the Commission nonetheless promulgates such a requirement, it should not only provide an exception for upgrades to the existing facilities of an incumbent transmission owner, but it should also expand that exception to include new facilities on an incumbent transmission owner's rights-of way and sub-stations. Also, upgrades to an existing system constitute far more than the extremely limited examples the Commission includes in the NOPR. For

example, upgrades to an existing system must include facilities such as Reliability Network Upgrades and Delivery Network Upgrades built under the Large Generator Interconnection Process.

The Commission properly recognizes – and as discussed above has previously recognized – that allowing third parties to construct upgrades to an incumbent transmission owner's facilities presents numerous practical complications. As such, the Commission has found that existing transmission owners should be solely responsible for building network upgrades and additions to their systems. For example, if a third party added a new circuit to a single circuit transmission line, how would ownership rights on the line be established? Who would be responsible for maintaining the new dual-circuit transmission line? Who would schedule outages or respond to forced outages? Who would be responsible for reliability standard violations on the new dual-circuit transmission line? There is no need for the Commission to introduce such issues into the transmission planning process.

Similar issues would arise if incumbent transmission owners are compelled to allow third parties to build facilities on an incumbent transmission owner's rights-of-way. Under what circumstances would the third party have access to the right-of-way for inspection and maintenance? Who would be responsible for such matters as clearing vegetation? Absent a voluntary agreement by the incumbent transmission owner, the Commission would have to resolve these issues, likely on a case-by-case basis.

In the context of generator interconnections, the Commission determined that the provision of the *pro forma* Large Generator Interconnection Agreement that allows interconnection customers reasonable access to the transmission providers' facilities when necessary to facilitate an interconnection "does not give either party *carte blanche* to use the lands of the other Party as its own."[94] A similar respect for the property rights of participating transmission owners is appropriate here.

Lastly, preserving the right of an incumbent transmission owner to build upgrades to its own facilities and new facilities on its right-of-way does not present concerns of undue discrimination. A third party seeking to construct upgrades or additional facilities on transmission lines or in substations owned by an existing transmission owner is simply not similarly situated to the existing transmission owner: it does not own the facilities. This distinction is important. The existing transmission owner has acquired the rights-of-way for the facilities; it has constructed the fundamental structures, such as the towers or substation buildings; and it has maintained these facilities over the years. The third party has done none of this – it is merely seeking to build upon the previous investments and efforts of the existing transmission owner. While the third party can negotiate with the existing transmission owner, who can agree voluntarily to allow the third party to build on the existing facilities or rights-of-way, it is not appropriate to act as if the third party already has rights to the existing transmission owner's facilities or rights-of-way absent such agreement.

[94] *Longview Power, LLC*, 112 FERC ¶ 61,022, at P 19 (2005).

5. The Commission Should Allow the Retention of Obligations of Existing Transmission Owners to Build Projects Identified in a Regional Plan

The obligation of existing transmission owners to build unsponsored projects found to be needed by a regional transmission plan is a concept closely related to the right to build reliability projects, as is the existing transmission owner's right to construct and own upgrades on existing transmission facilities. However, the NOPR correctly does not propose to modify these existing rights and obligations, and the ISO supports this approach. NOPR at P 97.

The NOPR's observations that it is important to retain existing obligations to build unsponsored projects are consistent with the approach taken by the ISO in its revised transmission planning process. Similar to the right of an incumbent participating transmission owner with a service territory to build reliability projects, the ISO tariff has historically contained a backstop requirement that these incumbents build projects found to be needed when so directed by the ISO. The ISO believes that it is necessary to retain the obligation of participating transmission owners with service territories to serve as the default entity with the obligation to build transmission elements identified in the comprehensive transmission plan for which there is no other approved project sponsor. It is appropriate that the participating transmission owners with service territories retain a reciprocal obligation to build all needed transmission facilities if there is no other qualified entity willing to do so to ensure the integrity and economic efficiency of the transmission system and to meet applicable policy requirements. This obligation ensures that the ISO will always have a backstop transmission

provider it can designate to build projects and elements in the ISO's Board-approved comprehensive plan if other project sponsors are lacking. Absent this backstop mechanism, needed transmission elements may be unacceptably delayed or even go unbuilt. The participating transmission owners with service territories are the franchised electric service providers in their service territory, they have the obligation to provide the transmission facilities needed to serve load, they are the providers of last resort, and they are entities with which the ISO has a contractual relationship. Where no one else steps up to build needed transmission, the ISO must have the ability to require these participating transmission owners to build such facilities.

6. The Commission Should Modify the Qualification Criteria Proposed in the NOPR

As discussed above, the ISO believes that existing transmission owners should retain the right to build certain categories of transmission facilities. However, the ISO sees an appropriate role for nonincumbent transmission developers and provided an expanded role for such developers in its revised transmission planning process through the creation of a competitive solicitation process for public policy-driven and economically driven elements of the ISO's comprehensive system plan. As such, the ISO would not oppose the establishment in the final rule of certain qualification criteria that would apply to all transmission project developers when ISOs and RTOs voluntarily provide for construction of projects by such developers.

The NOPR proposes that transmission providers include in their tariffs both appropriate criteria for determining an entity's eligibility to submit a project

into the regional planning process, and forms detailing all information needed for an evaluation of the proposed project. NOPR at PP 90 and 91. According to the NOPR, eligibility criteria should be sufficient for the transmission provider to determine whether the proposed project sponsor has the "financial and technical expertise to develop, construct, own, operate and maintain transmission facilities (footnote omitted)." *Id.* at P 90.

The ISO's revised transmission planning process provides for project sponsor eligibility screening and project selection in a two step procedure that takes place after the comprehensive transmission plan has been approved by the Board. If the plan includes economically driven and policy-driven elements, the ISO will initiate its competitive solicitation and project sponsor selection process.[95]

Once all of the project proposals have been submitted, the ISO will screen the submissions to determine:

- Whether the proposed project is consistent with the needed transmission elements identified in the plan;
- Whether the proposed project satisfies applicable reliability criteria and ISO planning standards; and
- Whether the project sponsor is *physically*, technically and financially capable of 1) completing the project in a timely and competent manner; and 2) operating and maintaining the facilities.[96]

The ISO's proposed project sponsor qualification criteria are consistent with the NOPR, but include one important qualification criterion not addressed in

[95] *See* Section 24.5.1 of the revised ISO Tariff.
[96] *See* Section 24.5.2.1

the NOPR. Potential project sponsors – including a project sponsor's overall team of employees, contractors and consultants – should also be able to show that they are *physically* capable of building and operating the project, in addition to being technically and financially capable of doing so. The ISO urges the Commission to modify the NOPR requirement to include physical capability as a criterion for sponsor selection.

Physical capability is a criterion used by regulatory commissions to determine whether an applicant should be granted a certificate of public convenience and necessity. A physical capability criterion is intended to ensure that a project sponsor's team has sufficient physical resources and capabilities, not just the technical capability, to construct a needed transmission element in a timely and competent manner in addition to all other transmission facilities that the project sponsor may be seeking to build.[97] Whether a project sponsor and its team have sufficient manpower to construct the facility and then operate and maintain it in compliance with all applicable statutes, rules, and regulations, is a critical factor that must be taken into consideration in determining whether the project sponsor is qualified.

[97] For example, the ISO notes that the Public Utility Commission of Texas uses similar criteria to select among competing transmission provider proposals to construct CREZ transmission facilities. One of the selection criteria is the current and expected capabilities of the potential transmission service provider to construct, operate, and maintain the line. *See* Tex. Admin. Code, tit. 16, R. 25.216(e). The Texas regulations require a discussion of the type of resources, including relevant capability and experience (in-house labor, contractors, other transmission service providers) contemplated for use by the proponent to construct the facility and other information designed to permit evaluation of the types of resources a proponent will use to operate and maintain the facility after it is placed into service, as well as the capability of proponent to undertake all operating and maintenance activities. See the ISO's June 4, 2010 filing letter in Docket No. ER10-1401 at 60.

The ISO would also support a criterion that requires developers to provide credit support or financial assurances that a transmission provider can call upon to protect rate payers and the transmission providers that will perform a backstop role to build the needed facility from any adverse consequences if a developer does not complete a project selected in the regional plan. The ISO notes that Section 24.1.1(a) of its existing tariff already imposes credit requirements on project sponsors proposing to construct Merchant Transmission Facilities. Specifically, the ISO may:

> require (1) a demonstration of creditworthiness (*e.g.,* an appropriate credit rating), or (2) sufficient security in the form of an unconditional and irrevocable letter of credit or other similar security sufficient to meet its responsibilities and obligations for the full costs of the transmission addition or upgrade.

Project sponsor qualification criteria could include similar credit requirements. Alternatively, utilities complying with the final rule could consider adaptations of the credit requirements applicable to market participants or Interconnection Customers to apply to transmission project sponsors.

Finally, in the event the Commission adopts a request window format wherein projects are submitted for evaluation prior to a finding of need by the transmission planner – an approach with which the ISO strenuously disagrees – then potential project sponsors should be required to submit with their project proposals sufficient study results evidencing a *prima facie* case that the project is needed. Such studies must be based on planning assumptions consistent with the assumptions used by the transmission planner tasked with evaluating the project. Should the project proponent be unable to establish a presumption of

need for the project, the transmission planner should be able to reject the project without further evaluation.

F. The Commission Should Not Mandate the Proposed Inter-Regional Coordination Requirements

The NOPR proposes to require each public utility transmission provider through its regional transmission planning process to coordinate with the public utility transmission providers in each of its neighboring transmission planning regions within its interconnection. NOPR at P 114. This coordination between transmission planning regions must be reflected in an inter-regional planning agreement to be filed with the Commission within one year after issuance of the final rule. *Id.* The NOPR proposes to require that the planning agreement include, *inter alia,* a detailed description of the process for coordination between public utility transmission providers in neighboring planning regions with respect to facilities that are proposed to be located in both regions, as well as inter-regional facilities that are not proposed but that could address needs more efficiently than separate intra-regional facilities. Such coordination and joint evaluation must be conducted in the same general time frame as, rather than subsequent to, each planning region's individual consideration of the proposed project.

The ISO is a strong supporter of regional and inter-regional planning efforts. However, the ISO submits that the NOPR's proposed inter-regional planning requirement is unsupported and unnecessary, as well as contrary to the Federal Power Act, as discussed in Section III.B.1 above. As an initial matter, the NOPR does not provide evidence that the nation's transmission providers

have failed to make sufficient commitments to interregional planning. To the contrary, both the provisions of the ISO's existing tariff and the proposed revised transmission planning process demonstrate the ISO's commitment to inter-regional planning. Separate planning agreements with every single interconnected balancing authority area are unnecessary.

Proposed ISO tariff Section 24.2(c) affirmatively provides that the process will involve coordination with interregional, regional, and sub-regional transmission plans and planning entities, including interconnected balancing authority areas. The details of this robust coordination effort are spelled out in the tariff.[98] In addition, the ISO requests the participation of numerous interconnected transmission providers and other regional and inter-state entities in the ISO's transmission planning process.[99] The ISO's transmission planning

[98] Proposed Section 24.3.2 (l) provides that the ISO will consider as an input into the Unified Planning Assumptions and Study Plan the planned facilities in interconnected balancing authority areas. Section 24.4.3 contemplates that any request window projects that affect other interconnected balancing area authorities will have been reviewed by the applicable regional or sub-regional planning authority. Section 24.4.4 contemplates ISO coordination with interconnected balancing area authorities and regional or sub-regional planning authorities to develop a conceptual statewide plan that, among other things, will identify transmission upgrades and additions necessary to achieve state and federal policy requirements and directives. Section 24.8.4 provides that the ISO will obtain from interconnected balancing authority areas and regional and sub-regional planning groups within the WECC information that is anticipated to be useful to the ISO in the transmission planning process. Section 24.13 provides that the ISO will be a member of WECC and other applicable regional and sub-regional organizations and participate in applicable coordinated planning processes. Section 24.13.1, Scope of Regional or Sub-Regional Planning Participation, is an entire tariff section dedicated to the scope of the ISO's collaboration with adjacent balancing authority areas and planning organizations. It contemplates that the ISO will exchange planning information, coordinate on assumptions and economic planning studies, maintain a website that contains relevant planning information, and facilitate the participation of these entities in the ISO's planning process.

[99] These groups include WestConnect Sub-Regional Groups (which include SMUD, TANC, and WAPA) Los Angeles Department of Water and Power, ColumbiaGrid, the Northern Tier Transmission Group, the Northwest Transmission Assessment Committee of the Northwest Power Pool, Southwest Area Transmission, Western Arizona Transmission Studies, Renewable Energy Transmission Initiative, and Arizona Biennial Transmission Assessment.

BPM also provides for robust regional and interregional coordination requirements.[100]

These provisions, individually and collectively, make it clear that the ISO's transmission planning activities will involve inter-regional and sub-regional coordination with other interconnected entities and balancing authority areas. In particular, the ISO has been coordinating with the California Transmission Planning Group ("CTPG") which is comprised of the planning authorities and load-serving transmission providers in California. The CTPG has been running a number of planning scenarios and testing a multitude of planning assumptions. The CTPG also serves as a forum for exploring potential joint transmission project between regions. These efforts have been purely voluntary, and parties have dedicated significant time and resources to these efforts.

Parties in the West have successfully and voluntarily coordinated in the past, and there is no evidence in the NOPR that this collaboration will not continue into the future. There are numerous existing, voluntary planning processes in the West that promote regional and inter-regional coordination. Recent coordination efforts by CTPG and WECC demonstrate that planners are actively coordinating. The traditional approach for allocating the costs of inter-regional projects in the West is one based on voluntary collaboration and cost-sharing among the beneficiaries, as contemplated by section 202 of the Federal Power Act. This has worked effectively. The NPOR concept that involves mandatory contracting and requiring advanced agreement to cost allocation

[100] See section 5.0 of the Business Practice Manual for Transmission Planning.

measures without knowing the specific facts and circumstances of the individual interregional project is neither appropriate nor effective.

Layering additional process requirements on transmission planners like the ISO is unwarranted and unduly burdensome. The ISO interconnects with twelve balancing authority areas most of which are not interconnected with each other. Requiring the ISO to negotiate individual transmission planning agreements with every one of these planning authorities -- especially within a one-year period -- is both unnecessary and impractical. It does not make sense to require the negotiation of planning agreements and cost allocation methods in advance with every single interconnected entity, especially in circumstances where there are no pending inter-regional projects or never have been between the two balancing authority areas. Any necessary agreements or processes can be put in place -- and have voluntarily been put in place in the past -- as specific interregional projects arise.

Also, the ISO's tariff already permits it to evaluate and approve interregional projects and include the costs of such projects in its transmission rates.[101] The ISO has in fact approved interregional projects and out-of-state transmission entitlements. There is no need for the burdensome remedy proposed by the Commission, particularly because the Commission's legal authority to impose such remedy is questionable absent legislation.

The NOPR also contemplates that regions will evaluate projects in the same timeframe. This creates additional logistics problems. The ISO and its

[101] *See e.g., Trans-Elect NTD Path 15, LLC*, 113 FERC ¶ 63,039 (2005), *order on initial decision*, 117 FERC ¶ 61,214 (2006)

neighbors have separate planning process with separate timelines. It simply would not be possible to synchronize the timing of the ISO's planning process with those of each of the twelve neighboring balancing authority areas unless the Commission were to impose the same timeline and process on everyone. Given, among other things, the uncertainty surrounding the Commission's legal authority over regional coordination, it is not clear how the Commission would accomplish this absent legislation.

The ISO notes that PJM and MISO attempted for many years to negotiate coordination agreements related to transmission planning, and those efforts raised numerous complex issues that have been extremely difficult to resolve. Multiply that situation by twelve and consider the fact that most of the transmission planners in these regions are not public utilities subject to the Commission's direct jurisdiction under Sections 205 and 206 of the FPA. Those are the circumstances the ISO will face if the interregional planning proposals of the NOPR is approved as written. Indeed, the problem facing the ISO may be even more difficult: it will not be able to develop a cookie-cutter agreement applicable to every interconnected balancing authority area, because the ISO's interconnected neighbors have different legal charters (*e.g.,* municipal utility, federal power authority, privately held corporation) that have different laws, regulations, and requirements applicable to each.

Moreover, regional entities can do all of the regional planning they want, but it is still up to the states to approve and site transmission. Interregional planning entities and regional planning authorities like the ISO do not have that

ability. It does not make sense to issue extensive and proscriptive mandates for interregional planning, which will require a substantial effort and the expenditure of significant time and resources, absent a corresponding requirement that the affected states approve the transmission projects that are identified as needed in any regional plan. That will require legislation. Requiring entities to involuntarily engage in interregional planning is unjustified and exceeds the Commission's legal authority under these circumstances.

G. The Commission Should Not Require the Filing of Inter-Regional Cost Allocation Methodologies

In the NOPR, the Commission proposes to require (1) **"**that every public utility transmission provider have in place a method, or set of methods, for allocating the costs of new transmission facilities that are included in the transmission plan produced by the transmission planning process in which it participates;" NOPR at P 159, and (2) "that each public utility transmission provider within a transmission planning region develop a method for allocating the costs of a new interregional transmission facility between the two neighboring transmission planning regions in which the facility is located or among the beneficiaries in the two neighboring transmission planning regions." *Id.* at P 161. The Commission proposes to require transmission providers to file these inter-regional cost allocation methodologies within one-year of the effective date of the final rule.

The ISO has explained above that these requirements are beyond the Commission's authority. As discussed below, there are also policy reasons militating against the requirement that utilities file allocation methodologies.

Rather than requiring the filing of predetermined cost-allocations, the Commission should simply promulgate the principles by which it will evaluate individual cost allocation agreements. This was the approach taken by the Commission in its Transmission Pricing Policy Statement in 1994.[102] As noted above, this is also the approach taken in pending legislation.[103] It is the approach the Commission should take now.

a. Regional Cost Allocation

The ISO agrees that an intraregional cost allocation methodology can be beneficial, at least in a region with a single transmission provider such as the ISO. A requirement that RTOs/ISOs file such allocations, however, is unnecessary in light of the existing voluntary arrangements in place. The ISO, for example, already has such a methodology in place through the transmission access charge provisions of the ISO tariff. The transmission access charge has been approved by the Commission as just and reasonable and consistent with cost-causation principles,[104] which decision was upheld by the Court of Appeals for the Ninth Circuit.[105] Inasmuch as neither the ISO's transmission access charge nor the cost causation principles have subsequently changed, the ISO has no reason to believe that its cost allocation methodology does not fulfill the purposes of the Commission's proposal.

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[102] *See Inquiry Concerning the Commission's Pricing Policy for Transmission Service Provided by Public Utilities Under the Federal Power Act, Policy Statement*, 59 Fed. Reg. 55,031 (Nov. 3, 1994), FERC Stats. & Regs. ¶ 31,005 (1994), *order on reconsideration*, 71 FERC ¶ 61,195 (1995).
[103] *See* S. 1462, American Clean Energy Leadership Act (111th Congress).
[104] *Cal. Indep. Sys. Operator Corp.*, 109 FERC ¶ 61,301 (2004).
[105] *State Water Contractors v. FERC*, 285 Fed. Appx. 397 (2008) (unpublished memorandum opinion).

b. Inter-regional Cost Allocation

The ISO does not have a generic cost allocation methodology for inter-regional facilities either in its tariff or in any agreements with neighboring regions. A number of the ISO's participating transmission owners, however, have capacity entitlements in inter-regional facilities that they have placed under the ISO's operational control. The participating transmission owners' costs for these facilities are included in their transmission revenue requirements and recovered through the transmission access charge. The cost allocation for these facilities was worked out among the participants or owners and is generally based on the capacity available to each.

This case-by-case determination of cost allocation for transmission facilities that connect multiple regions has worked well in the West, and the ISO sees no reason to replace it with a pre-determined generic cost allocation methodology (or multiple generic methodologies) for each region that neighbors the ISO. Each new inter-regional transmission project presents different circumstances, and the utilities, the ISO , and other regional planning authorities will bring distinct interests to the table. A new facility might deliver needed baseload power to one region and represent the opportunity to access future sources of renewable energy or to decrease congestion costs to another. One region may be in need of firm capacity to deliver critical resources, while another may only be looking to expand its opportunities to use cost-efficient generation when capacity is available. Each of these different circumstances may warrant different approaches to inter-regional cost allocation.

Establishing a one-size-fits-all cost allocation methodology, even between two regions, presents too many variables. What value is assigned to the number and location of loads to be served and generators to be directly or indirectly interconnected, which will never be constant? What of a line that traverses three or more regions? How can the methodology anticipate the relative value of reliability improvements, congestion relief, access to low-cost energy, and compliance with environmental standards? These different considerations are all best evaluated on a case-by-case basis. If two or more regions are able to jointly plan an inter-regional facility, there is no reason they should not be able to jointly determine the proper cost allocation for that individual facility. Moreover, to the extent multiple regions cannot agree on a cost allocation methodology for a specific inter-regional project, the issue can be presented to the Commission for resolution in the context of specific concrete facts. This would be a far better use of available resources that requiring regions devote substantial resources to negotiate inter-regional cost allocation rules in advance that anticipate all of the variables that may be relevant to an inter-regional project.

Hardwiring an inter-regional cost allocation methodology in advance without knowing the specific facts and circumstances of a particular project is a perilous task. Power systems are dynamic and, as such, the benefits of a project could change as new transmission facilities are added to the systems of the regions to which a particular cost allocation methodology applies. Also, new technologies may be developed that could render any pre-determined cost-allocation methodology meaningless. Requiring regions to agree on a cost

allocation methodology -- or imposing a default allocation on them -- without having a specific project in mind could easily mean that by the time an actual inter-regional project arises, the methodology is outdated and will not properly reflect the benefits of the project. The Commission is requiring transmission providers to engage in a difficult and lengthy effort that may not in fact be meaningful or applicable when an actual project arises. That is not an effective use of resources, especially if there never are any inter-regional transmission projects between two interconnected balancing authorities. Rather, a voluntary, case-specific approach is more efficient and meaningful.

Assuming *arguendo* that the Commission has the authority to order regions to involuntarily "agree" in advance on the allocation of costs for projects that traverse both regions, and regardless of whether the Commission issues cost allocation principles or requires the filing of cost allocation methodologies, the ISO urges the Commission to retain in the final rule the concept, set forth in the NOPR, that "inclusion of the interregional transmission project in each of the relevant regional transmission plans would be a prerequisite to application of an interregional cost allocation principle proposed , ,,,in this NOPR." [106] If a region does not find a need for a specific inter-regional project in its regional planning process and does not include the interregional project in the region's transmission plan, customers in that region should not be required to pay any costs of the project. Absent such a requirement, parties could build an inter-regional line that arguably provides some benefits to a region, but which is not needed by the region to meet its requirements, and then attempt to pass on

[106] NOPR at P 174.

some of the costs of the project to others in order to defray the cost impact on customers in the region where the project was needed. An involuntary allocation of the costs of inter-regional projects is unreasonable and inappropriate. .

Also, hardwiring approval of a project if it produces a certain level of benefits is inappropriate. There could be a situation where a regional alternative provides more net benefits than an interregional project and would obviate the need for the interregional project. Requiring approval of the interregional project would be inappropriate under those circumstances. Also, circumstances can arise where an inter-regional project provides benefits, but it is not needed. For example, an interregional transmission line may be used to deliver renewable resources to a region in order to meet RPS goals. However, if the "sink" region already has more than enough transmission and generation to meet the RPS goal, the interregional project is not needed to meet public policy objectives, and the "sink" region should not be bearing the costs of such line. These are further examples why it is extremely important that a region's planning process start with a needs identification at the start, with optimal solutions to meet those needs developed through an open process, rather than through the serial evaluation of multiple projects submitted without regard to whether a need exists.

IV. CONCLUSION

For the foregoing reasons, the ISO urges the Commission to issue a final rule which eliminates those proposals that undercut effective transmission planning and exceed the Commission's authority. In the alternative, the Commission should provide regions with sufficient flexibility to comply and

implement processes, like the ISO's revised transmission planning process in Docket No. ER10-1401, that achieve the objectives described in the NOPR, but do not necessarily follow all the specific requirements proposed in the NOPR.

Respectfully submitted,

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Dated: September 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all of the parties listed on the official service list for the captioned proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010).

Dated at Folsom, California this 29th day of September, 2010.

Anna Pascuzzo

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