

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

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

COMMENTS OF THE ISO/RTO COUNCIL

The ISO/RTO Council (“IRC”)¹ respectfully submits these joint comments on the Notice of Proposed Rulemaking (“NOPR”) of the Federal Energy Regulatory Commission (“Commission”) concerning Transmission Planning and Cost Allocation.² The IRC shares the Commission’s view regarding the importance of regional and interregional transmission planning and its recognition that significant progress has been made in the development of needed new transmission infrastructure. IRC members continue to implement robust transmission planning processes which, since implementing their transmission expansion planning processes during the last decade, has resulted in approximately \$48 billion of transmission in the U.S. that has been approved under the IRC members’ transmission planning processes.³ Under Commission-

¹ The IRC is comprised of the Alberta Electric System Operator (“AESO”), the California Independent System Operator (“CAISO”), Electric Reliability Council of Texas (“ERCOT”), the Independent Electricity System Operator of Ontario, Inc., (“IESO”), ISO New England, Inc. (“ISONE”), Midwest Independent Transmission System Operator, Inc. (“Midwest ISO”), New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, L.L.C. (“PJM”), Southwest Power Pool, Inc. (“SPP”), and New Brunswick System Operator (“NBSO”). The IESO, AESO and NBSO are not subject to the Commission’s jurisdiction and such entities have not joined in these comments. Furthermore, ERCOT is not subject to the Commission’s jurisdiction for issues presented in the NOPR and it has not joined in these comments. The IRC’s mission is to work collaboratively, to develop effective processes, tools and standard methods for improving the competitive electricity markets across North America. In fulfilling this mission, it is the IRC’s goal to provide a perspective that balances reliability standards with market practices so that each complement the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers. Additionally, individual IRC members may file separate comments in this proceeding. Accordingly, the absence of the IRC’s comments on specific proposals in the NOPR should not be deemed acquiescence on the part of the IRC members to such proposals.

² *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Notice of Proposed Rulemaking, 131 FERC ¶ 61,253 (2010).

³ This amount represents the transmission approved under the transmission planning processes of IRC members that have joined in these comments.

approved, Order No. 890-compliant processes, ISOs and RTOs establish the need for projects, based on reliability- and economic-related criteria, and through an open, transparent stakeholder process, evaluate solutions that meet those needs.⁴

As the Commission's goals for transmission planning and cost allocation evolve to require consideration of state and federal public policy objectives, the IRC asks that the Commission's final rule in this proceeding preserve the good work that the ISOs and RTOs have accomplished to date. Further, the IRC requests the Commission's final rule clarify and, in some instances, exclude, certain of the proposals contained in the NOPR, as discussed herein.

Specifically, the IRC proposes:

- elimination of the proposed five-year priority property right for submitted transmission projects as such proposal will work against the goals of efficient and effective transmission infrastructure development;
- confirmation that existing Commission-approved ISO/RTO planning processes which already develop regional transmission plans would satisfy the proposal concerning regional planning and clarification that the final rule does not require ISOs/RTOs to re-litigate this issue or to provide further justification;
- clarification that the ISO/RTO regions would continue to be considered "regions" for the purposes of the Commission's final rule;

⁴ *California Independent System Operator Corporation*, 127 FERC ¶ 61,172 (2009); *ISO New England Inc.*, 127 FERC ¶ 61,170 (2009); *PJM Interconnection, L.L.C.* 123 FERC ¶ 61,163 (2008), *order on compliance*, 127 FERC ¶ 61,166 (2009); *order on compliance*, 130 FERC ¶ 61,167 (2010); *New York Independent System Operator, Inc.*, 125 FERC ¶ 61,068 (October 16, 2008); *Order on Compliance; New York Independent System Operator, Inc.*, 129 FERC ¶ 61,044 (October 15, 2009), *Order on Compliance; New York Independent System Operator, Inc.*, 132 FERC ¶ 61,028 (July 15, 2010); *New York Independent System Operator, Inc.*, 132 FERC ¶ 61,188 (August 30, 2010), *Order on Compliance; Southwest Power Pool, Inc.*, 124 FERC ¶ 61,028 (2008); *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶ 61,154 (2008), *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶ 61,164 (2008), *Midwest Independent Transmission System Operator, Inc.*, 123 FERC ¶ 61,165 (2008), *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,109 (2009), *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶ 61,108 (2009), *Midwest Independent Transmission System Operator, Inc.*, March 10, 2009 Unpublished Letter Order, *Midwest Independent Transmission System Operator, Inc.* November 12, 2008 Unpublished Letter Order, *Midwest Independent Transmission System Operator, Inc.*, 130 FERC ¶ 61,232 (2010), *Midwest Independent Transmission System Operator, Inc.*, 130 FERC ¶ 61,232 (2010).

- allowance for flexibility in establishing the process for identification of the public policy objectives to be considered in the planning process;
- clarification of the Commission’s intent with respect to the requirement for “joint evaluation” in interregional planning; and
- to the extent the final rule requires submission of interregional planning and cost allocation agreements, modification of the requirement that transmission planning entities submit such agreements within one year of the final rule.

The transmission planning processes of the individual IRC members, although based on core Commission orders such as Order Nos. 890⁵ and 2003,⁶ reflect significant regional differences and have been separately developed over the years based on the particular facts, stakeholder processes, and circumstances surrounding each ISO’s and RTO’s formation. Accordingly, most of the issues raised in the NOPR (other than those specified herein) are best addressed by the individual ISOs and RTOs in their individual comments, and not through IRC joint comments. Thus, the absence of IRC comments on specific proposals in the NOPR should not be deemed acquiescence on the part of the IRC or the IRC’s members to such proposals.

I. Priority Property Right to Transmission Proposals

The Commission should reconsider its proposal that would provide project sponsors a priority property right. Specifically, the NOPR provides:

Fifth, we propose to require that if a proposed project is not included in a regional transmission plan and if the project’s sponsor resubmits that proposed project in future transmission planning cycle, that sponsor would have the right to develop that project under the foregoing rules even if one or more substantially

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh’g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh’g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

⁶ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh’g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh’g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh’g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff’d sub nom. Nat’l Ass’n of Regulatory Util. Comm’rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

similar projects are proposed by others in the future transmission planning cycle. The OATT must state that this priority to develop the proposed facility continues for a defined period of time (*e.g.*, for resubmission annually in subsequent transmission planning cycles over a 5-year period).⁷

This proposal would not further the Commission’s goal of improving the effectiveness of transmission planning and the efficiency of resulting transmission development.⁸ In fact, creation of this new property right in the final rule could actually undermine that goal. As explained more fully below, this proposal should be rejected for the following reasons:

- The priority property right proposal creates an unwarranted new right of first refusal which will suppress the submission of innovative transmission proposals.
- The priority property right will create a new monopoly right and encourage gaming.
- Significant implementation problems are presented by the proposal.
- The proposal is inconsistent with planning processes that start with the identification of needs rather than projects.
- The proposal does not achieve the intended results.

The Priority Property Right Proposal Creates an Unwarranted New Right of First Refusal Which Will Suppress the Submission of Innovative Transmission Proposals --

Although obviously intended otherwise, the Commission’s proposal could well end up creating a new barrier to robust transmission development. Elsewhere in the NOPR, the Commission seeks to remove from ISO/RTO tariffs any references to an incumbent’s “right of first refusal” based on its belief that such a right may inhibit the submission of creative proposals for resolving identified transmission needs. However, by granting the entity submitting a transmission

⁷ *Id.* at P 95.

⁸ NOPR at P 3.

proposal a new continuing ownership right over that proposal, the Commission would effectively be creating a new “right of first refusal” in the very order in which the Commission seeks to remove rights of first refusal for incumbent transmission providers.⁹ Rather than providing that the ISO/RTO obtains a fresh and robust array of proposals to solve an identified system need, the proposal will work to suppress such submissions as developers will now face new disputes and potential litigation as to whether their proposal is similar to one submitted (and rejected) up to five years before.

The Priority Property Right Proposal Will Create a New Monopoly Right and Encourage Gaming -- If the proposal is implemented, a mere “project on paper” (even if rejected in a prior planning process) would have some new-found future economic value. In the pursuit of revenue opportunities, this proposal could encourage transmission developers to “race to the courthouse” to stake out their future rights as broadly as possible in order to establish a “claim” that could provide revenues from future sale or trading of this amorphous property right. This “race to the courthouse” would encourage a flood of possibly questionable projects submitted solely to establish a cost-free lien on two points on a map. This “lien” once created, could in effect create a new barrier to entry and work against the submission of thoughtful, well-developed transmission proposals (that bear some degree of similarity to earlier projects) for consideration in a transparent planning process.

Significant Implementation Problems Are Presented by the Proposal -- The proposal as drafted will create significant implementation challenges for the regional planning entities. For example, it is unclear how a “project” is defined for purposes of the priority property right. Does the newly-created ownership right apply to any submission connecting two points on a map?

⁹ *Id.* at P 93.

Does it attach to a mere concept or does it require something greater, such as a detailed proposal outlining a specific technology and voltage choice? Does the entity enjoying this new right have to demonstrate that it can realistically obtain state siting approval and the needed right-of-way for its project? Or, is the property right limited to those entities who have ownership of the actual right-of-way associated with a given project?

Unless the final rule is crystal clear and anticipates all possible scenarios, each of these questions will inevitably lead to disputes and/or litigation over which entities enjoy this newly created property right. Moreover, the practical challenges of implementing the proposal will distract if not overwhelm already resource-strained ISO/RTO planning processes. For example, ISOs/RTOs would have to ensure that each feature of a proposed project (even one not fully defined) is sufficiently defined so that the ISO/RTO has a sufficient future record to determine, over the next five years, whether the project is “similar” to another project which might be submitted.¹⁰ Even with a tracking system created just for this process, ISOs/RTOs would need to have a process for “adjudicating” whether a previously proposed project is “similar” to a newly proposed project such that the previously proposed project can maintain its priority right – thus requiring a legal process for adjudicating the similarity of projects to those previously rejected. Finally, assuming that the right is transferrable, ISOs/RTOs would need to keep track of who is the owner of a given proposal in order to properly implement the new-found property right. For example, the “right” to a proposed project could well have been sold or traded – or combined with rights for other projects – during the five-year period in order to maximize potential revenues. In addition, the ISO/RTO may find that the original developer may no longer be

¹⁰ The IRC notes that this proposal would impose a level of complexity at least as great as what existed in the Generation Interconnection process that prompted the Commission’s proceeding on interconnection queue process reform. See *Interconnection Queue Reform*, 121 FERC ¶ 61,252 (2008).

willing or able to proceed with the project. The ISO/RTO would have to figure out not only whether the new and “protected project proposals are similar, but which entity is both entitled and able to build a previously rejected project.

All of this complexity might be acceptable if it could truly lead to more expeditious development and construction of needed transmission infrastructure. However, the complexity would clearly bog down the process. In 2008, the Commission took steps to simplify its interconnection queue process in recognition that its original rules were creating complexity that was discouraging rather than encouraging needed generation infrastructure and an efficient planning process.¹¹ The Commission should heed its prior experience and avoid adding new complexity to the planning process.

The Proposal Is Inconsistent with Planning Processes That Start With the Identification of Needs Rather Than Projects – The priority property rights proposal starts with the presumption that the submission of transmission projects rather than the identification of system needs drives the transmission planning process. In a number of ISOs/RTOs, planning does not start from the submission of “projects” *per se*, but rather begins with needs analyses that guide the collaborative development of a solution.

While transmission planning processes should certainly allow for all interested stakeholders to provide input into the process that leads to a transmission plan, transmission developers – whether incumbent or non-incumbent – should not be permitted to gain a priority right to a project proposal that does not meet a need previously identified by the ISO/RTO.

¹¹ See note 10, *supra*.

The Proposal Does Not Achieve the Intended Results – In summary, the creation of a new property right will undermine the open and collaborative discussions that regional planning processes rely on to help identify the optimal solutions to reliability issues, creating a chilling effect on viable project development. It is worth repeating that the Commission would effectively be creating a property right in a project which was *rejected* in the planning process. If a project sponsor retains an entitlement to a failed proposal for several years, this will discourage input and participation by market participants seeking to develop superior solutions as they will have to grapple with the possibility of a required “buy out” of the developer of a previously rejected project. This simply cannot advance the broader goals the Commission has outlined in this NOPR.

The IRC suggests that the Commission’s objective to ensure that nonincumbent transmission developers have the opportunity to participate in the transmission planning process is best met through requiring an open and transparent, transmission planning process. Accordingly, there is no need to adopt a separate proposal such as the priority property right proposal to carry out the Commission’s objectives.

II. Regional Planning

The NOPR states that Order No. 890 did not go far enough in implementing the Commission’s “regional participation” principle,¹² and that transmission providers must participate in a regional process that produces a regional transmission plan.¹³ The IRC strongly supports the inclusion of all transmission providers within a regional planning process.

¹² *Id.* at P 49.

¹³ *Id.* at P 50.

The ISOs and RTOs understand that this proposal was intended to address the fact that Order No. 890 applied to individual planning authority processes but did not require similar processes at the regional level in non-ISO/RTO regions such as the northwest and southeast. Because the ISOs and RTOs already conduct regional and interregional planning processes and have already received compliance orders on their Order No. 890 planning processes,¹⁴ under which the ISOs and RTOs continue to develop regional transmission plans, no purpose would be served by mandating that ISOs and RTOs resubmit and re-justify that their planning processes meet the Commission’s planning principles in Order No. 890. Thus, the IRC asks that the Commission’s final rule reflect that ISOs and RTOs already satisfy this requirement and that no further demonstration is necessary in a future compliance filing with the exception of any new or altered requirements imposed by the final rule.¹⁵

Additionally, the IRC asks that the Commission’s final rule clarify that the ISO and RTO regions established under Order Nos. 888 and/or 2000 would continue to be considered “regions” for the purposes of this proposal. The footprints of each ISO and RTO have been approved by the Commission as reflective of an appropriate size and scope for undertaking the independent planning required under Order Nos. 2000 and/or 890. The ISOs and RTOs are concerned that the proposed rule could be read as requiring new proceedings to litigate the appropriate boundaries of ISO and RTO regions. Such litigation could have a significantly disruptive effect just as ISOs and RTOs are participating in state siting processes to advance critically needed new infrastructure. In short, the Commission should clarify that the language calling for “regional

¹⁴ See note 4, *supra*.

¹⁵ See NOPR at P 33 (stating the Commission’s intent to avoid disruption of the progress that has been made with respect to transmission planning and investment; but to address deficiencies); *see also* NOPR at P 64 (stating that the requirement that public policy objectives be considered in transmission planning is a supplement to, not a replacement for, existing reliability and economic transmission planning requirements).

processes” in the NOPR does not open up a new round of litigation at the Commission or create new issues in state siting proceedings. The ISOs and RTOs offer the following clarifying language for the final rule, or for the order accompanying it:

By this Final Rule, the Commission does not intend to reconfigure or otherwise change the boundaries of existing ISOs and RTOs. Furthermore, the Commission recognizes that the Commission-approved transmission planning processes of the ISOs and RTOs already meet the requirement of this Final Rule to develop a transmission plan and thus, no further compliance filing is necessary by ISOs and RTOs in that regard.

III. Public Policy Requirements

The IRC supports the NOPR’s objective to broaden the scope of transmission planning to consider public policy objectives that are embodied in state and federal laws and regulations. However, the IRC believes that flexibility should be provided with regard to the specific means for ISO/RTO implementation of this proposal so that different regions can implement the requirement in ways that take into account regional differences (*e.g.*, whether the identification of criteria emanates from regional state committees, stakeholders, or the ISO/RTO itself). For example, some ISOs and RTOs are located within a single state while others span multiple states. This factor alone militates for flexibility in establishing the process for identification of the public policy objectives to be considered in the planning process. Accordingly, each ISO and RTO should be permitted to address through its compliance filing the specific procedures and mechanisms it is adopting to comply with the Commission’s directives.¹⁶

IV. Interregional Planning Reforms

The Commission proposes that submission of a project that would be located in more than one transmission planning region (*i.e.*, cross border projects) would trigger a procedure

¹⁶ . Individual RTO and ISO comments may address various substantive aspects of the proposal including the NOPR’s proposal as to the requirements governing the ISO and RTO consideration of the identified criteria in their respective planning processes.

under which “the transmission planning regions would coordinate their reviews of and jointly evaluate the proposed project.”¹⁷ Clarification is needed as to what the Commission intends in its requirement of “joint evaluation.” Does joint evaluation require coordination of stakeholder meetings and processes? Is each region still able to use its own tariff planning criteria and consider the project within its own planning cycle or does the Commission intend to create a new set of criteria and planning cycle as part of its requirement of “joint evaluation” of projects?

The IRC believes that implementation of this rule may be quite different for an entity such as the California ISO which would have to establish “joint evaluation” criteria with up to 12 neighboring planning entities, most of which themselves are not interconnected to each other, versus a more limited number of neighboring planning authorities with which other ISOs/RTOs would need to coordinate in order to comply with this requirement. Further, establishing a process by which two or more regions will jointly evaluate cross border projects potentially will require reconciling various issues – such as coordinating planning cycle timeframes, the timing of joint stakeholder meetings (if any), how to reconcile different planning and/or cost allocation criteria across the regions, state siting issues – depending on the regions involved. To the extent the final rule mandates interregional planning and cost allocation, the proposal that transmission planners submit final interregional agreements within one year of adoption of the final rule is unworkable due to the complexity, limited resources, the need to involve stakeholders and potentially the number of agreements to be reached.

V. Conclusion

WHEREFORE, the IRC respectfully asks the Commission to take into consideration its comments as described herein.

¹⁷ NOPR at P 118.

Respectfully submitted,

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