

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

Annual Charges Assessments For)	
Public Utilities)	Docket No. AD08-7-000
)	
)	

JOINT REPLY COMMENTS OF THE ISO/RTO COUNCIL

The ISO/RTO Council (“IRC”)¹ respectfully submits these reply comments in the captioned docket. In light of various comments filed by other parties, the IRC provides the following reply comments to ensure that (1) the Federal Energy Regulatory Commission (“Commission”) has a complete and accurate record to assess the positions taken by parties in this proceeding and (2) the issues before the Commission are properly framed in light of some extraneous issues that have been presented by commenters

¹ The IRC was formed by the ten functioning Independent System Operators (“ISOs”) and Regional Transmission Organizations (“RTOs”) in North America in April 2003. It is comprised of the ISOs operating as the Alberta Electric System Operator (“AESO”), California Independent System Operator (“CAISO”), New Brunswick System Operator (“NBSO”), Electric Reliability Council of Texas (“ERCOT”), the Independent Electricity System Operator of Ontario (“IESO”), ISO New England, Inc. (“ISO-NE”), Midwest Independent Transmission System Operator (“MISO”), New York Independent System Operator, Inc. (“NYISO”), PJM Interconnection, L.L.C. (“PJM”) and Southwest Power Pool, Inc. (“SPP”). The IRC’s mission is to work collaboratively to develop effective processes, tools, and standard methods for improving 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 complements the other, thereby resulting in efficient, robust markets that provide competitive and reliable service to customers. As they are not subject to the jurisdiction of the Commission, the AESO, IESO, and NBSO are not joining these comments. In addition, ERCOT and ISO-NE are not participating in these comments.

opposing any reform in the method the Commission currently uses to allocate the costs of its regulatory program.

INTRODUCTION

Pursuant to the Commission's April 21, 2008 Notice of Inquiry ("NOI"),² the IRC and several other parties submitted comments addressing the Commission's inquiry as to whether it should retain its present annual assessment allocation methodology or whether it should adopt a new methodology, and what any new methodology should comprise. The IRC and many parties³ argued that the present allocation methodology is unfair, inequitable and unduly discriminatory in that it assesses charges against the transmission component of retail energy sales made by members of RTOs and ISOs, but excludes the transmission associated with retail volumes served by utilities that do not belong to regional organizations. This disparity has resulted in RTO and ISO members being assessed over 80% of the Commission's annual electric regulatory program costs, despite the fact that these entities serve only slightly more than half of the annual peak volume.⁴

In addition to identifying the inherent problem with the Commission's existing fee assessment mechanism, the IRC proposed several alternatives to remedy this undue

² Annual Charges Assessments for Public Utilities, 73 Fed. Reg. 22,867 (Apr. 28, 2008) ("NOI").

³ In addition to the IRC, such parties include the Detroit Edison Company, Exelon Corporation, FirstEnergy Companies, the Kansas Corporation Commission, Members of PJM Interconnection, Midwest ISO Transmission Owners, National Grid USA, New York Transmission Owners, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern Illinois Power Cooperative and Hoosier Energy Rural Electric Cooperative, Inc.

⁴ See Comments of the ISO/RTO Council, Docket No. AD08-7-000, at 13 nn.33 & 34 (May 28, 2008) ("IRC Initial Comments").

discrimination while permitting the Commission to recover all of its regulatory costs in a fair and equitable manner. The IRC's proposed alternatives – based upon all reportable electric energy, peak transmission load, a two-tiered structure, or functionalized assessments – were endorsed by several parties. The IRC also provided comments on why other suggested approaches may be problematic.

Despite wide agreement regarding the problem and need for reform, a minority of parties expressed opposition to any change to the existing Commission assessment methodology and injected extraneous arguments into the debate. Some of these extraneous issues are resolved simply by adoption of one of the aforementioned IRC suggested alternative assessment approaches. However, certain other arguments aim only to distract the Commission from developing a methodology that is fair and equitable to all entities that are subject to the charges.

Specifically, the IRC wishes to highlight that:

- (A) The Commission need not address issues raised by generators and power marketers associated with assessments on power sales in order to provide the requested relief; and
- (B) The Commission need not become embroiled in arguments concerning jurisdiction raised by certain commenters.⁵ The alternative methodologies proposed by the IRC for the assessment of annual charges reflect basic rate design and cost allocation principles and do not constitute an exercise of Commission jurisdiction. As with the current methodology, the IRC's proposals direct annual charge invoices only to jurisdictional public utilities.

⁵ *E.g.*, Comments of FPL Group, Inc., Docket No. AD08-7-000 (May 28, 2008) (“FPL Comments”); Comments of Portland General Electric Co., Docket No. AD08-7-000 (May 28, 2008) (“Portland Comments”); Comments of Southern Company Services, Inc. and Progress Energy, Inc., Docket No. AD08-7-000 (May 28, 2008) (“Southern/Progress Comments”).

- (C) The Commission must develop some mechanism to recover the costs associated with its new reliability jurisdiction resulting from EPAct 2005 from all users, owners and operators of the bulk power system.

COMMENTS

A. The Commission Can Reform Its Present Methodology to Eliminate Undue Discrimination Without Assessing Wholesale Power Sales.

Some commenters advocate continuation of the Commission's current methodology instead of reverting back to the prior methodology based on both transmission volumes and power sales volumes.⁶ These commenters seem primarily concerned with avoiding Commission assessment of regulatory charges to wholesale power sales transactions.⁷ While at the outset these comments appear to advocate the status quo, they are actually entirely compatible with the comments of the IRC and other transmission providers regarding elimination of the RTO/non-RTO disparity. Hence, the Commission can be sensitive to the concerns of both camps by reforming its existing methodology to remove the RTO/non-RTO disparity while retaining an allocation methodology with a transmission-based focus – *i.e.*, allocating costs based on the volumes which flow on the transmission systems of Commission-regulated entities.

⁶ Prior to the adoption of Order No. 641 in 2000, Commission charges were assessed based on each jurisdictional utility's total wholesale volume of long-term firm sales and transmission and short-term sales and transmission and exchanges. Order No. 641 changed course by assessing charges only on transmission service. *Revision of Annual Charges Assessed to Public Utilities*, Order No. 641, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,109 (2000), *reh'g denied*, Order No. 641-A, 94 FERC ¶ 61,290 (2001).

⁷ The NOI requests comments on whether the Commission should return to its previous method of basing charges on power sales and transmission. NOI at P 22.

As indicated in the IRC's initial comments,⁸ the Commission need not return to its pre-Order No. 641 assessment method, and doing so may actually prove difficult if not impossible. Although the IRC seeks reform to remedy the discrimination against its stakeholders from the present assessment, the IRC is *not* seeking a return to an assessment methodology that allocates Commission regulatory costs to sales for resale for many of the reasons stated by the commenters. Any such methodology would no doubt embroil the Commission in some of the same disparities that exist today. Consequently, the Commission should use objective, easily verifiable and nondiscriminatory allocators, such as total usage of the transmission grid as proposed by the IRC, rather than attempting to parse which power sales are for "resale" versus serving "native load". To do otherwise will simply substitute one form of discriminatory allocator for another given the differences in how native load is served in RTOs versus non-RTO regions.

Remedying the RTO/non-RTO disparity does not require identifying wholesale power sales as a separate element over and above transmission as the basis of Commission assessments. To the contrary, as indicated in the IRC initial comments, there are several potential assessment methodologies that preserve the transmission-based focus of the present methodology but simply allocate charges differently across the transmission volumes of the entities presently subject to assessments. As evidenced by the initial comments of several parties who expressed support for maintaining the current

⁸ IRC Initial Comments at 26.

methodology,⁹ their primary concern is avoiding the assessment of wholesale sales volumes, *per se*. These same commenters recognize the need to eliminate the RTO/non-RTO disparity in order to remedy the discrimination that presently exists with the Commission's assessment methodology.¹⁰ Therefore, the Commission can demonstrate sensitivity to both viewpoints by adopting a methodology (such as one of the IRC-proposed approaches) that addresses the RTO/non-RTO disparity and allocates costs based on transmission volumes without resorting to a methodology that separately assesses wholesale sales volumes.

B. The Commission Should Avoid the Jurisdictional Red Herring Set Forth By Those Opposing Reform to the Assessment Methodology.

Certain commenters¹¹ allude, in varying degrees, to issues concerning jurisdiction over bundled sales as a reason the Commission should reject reforms of its present assessment methodology.¹² As these parties implicitly recognize, jurisdiction is not a

⁹ See Comments of Dynegy Power Marketing, Inc., Docket No. AD08-7-000, at 3 (May 28, 2008) (“Dynegy Comments”); Comments of the Electric Power Supply Association, Docket No. AD08-7-000, at 5 (May 28, 2008) (“EPSA Comments”); Comments of Reliant Energy, Inc., Docket No. AD08-7-000, at 2 (May 28, 2008) (“Reliant Comments”); Comments of Southern California Edison, Docket No. AD08-7-000, at 2-3 (May 28, 2008) (“SCE Comments”).

¹⁰ Dynegy Comments at 3, 9-10; EPSA Comments at 3; Reliant Comments at 2; SCE Comments at 3.

¹¹ Such commenters include FPL Group, Inc. (“FPL”), Portland General Electric Company (“Portland”), Southern Company Services, Inc. and Progress Energy, Inc. (“Southern/Progress”).

¹² It is somewhat curious that Southern would suggest possible jurisdictional impediments to any methodology that includes bundled retail load within the assessment denominator. A recent filing by Southern establishes the very point argued by the IRC – *i.e.*, that the consideration of bundled retail services as part of FERC's rate design and cost allocation process does not encroach on state regulatory authority. See *Southern Company Services, Inc.*, 123 FERC ¶ 61,204 (Continued . . .)

function of cost allocation, leaving only challenges to the “indirect” effects of any methodological change¹³ and/or or claims that the existence of state regulatory assessments is somehow controlling on the Commission.¹⁴

These attempts to cloud the issue are wide of the mark. The IRC’s proposed assessment methodology does not impact, let alone dictate, the scope of the Commission’s jurisdiction. The IRC took great pains to make clear in its filing¹⁵ that it is not seeking for the Commission to revisit the jurisdictional splits over transmission established in Order No. 888¹⁶ and upheld by the Supreme Court in *New York v. FERC*.¹⁷ As is currently the case, only jurisdictional public utilities will be invoiced for annual charges under the IRC’s proposal. However, unlike the current methodology, power flows across all public utilities, whether inside or outside RTOs or ISOs, will be treated the same under the IRC’s proposal – *i.e.*, through the recommended change in the

(. . . Continued)

(2008) (approving a “Transmission Facility Cost Allocation Tariff” proposed by Southern to allocate transmission costs associated with serving bundled retail load among Southern’s transmission-owning affiliates).

¹³ Southern/Progress Comments at 3, 6-7.

¹⁴ FPL Comments at 10-11.

¹⁵ IRC Initial Comments at 21 n.50.

¹⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *reh’g denied*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁷ *New York v. FERC*, 535 U.S. 1 (2002).

allocation factors used to determine annual charge assessments. In short, the choice of an allocator does not constitute the exercise of jurisdiction. To argue otherwise is to mix principles of rate design with jurisdiction black letter law, a *non sequitur* that can only work to confuse the issue.

The courts have recognized that the Commission's jurisdiction over rate design is broad and its exercise of that authority is separate and apart from its underlying jurisdictional reach.¹⁸ This is not a new or novel concept. For example, in rate cases, the Commission has long used allocators which encompass system coincident peak, miles of transmission, or other measures which are not limited to wholesale or retail criteria.¹⁹ Including retail volumes in the denominator of the annual assessment allocation equation is no different than the Commission's routine practice of including bundled retail volumes in the denominator for purposes of calculating transmission service rates – *i.e.*, including retail volumes in the system peak for purposes of employing a coincident peak allocator

¹⁸ Cf. *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663 (D.C. Cir. 2007) (holding that the Commission may consider the rates of non-jurisdictional entities in setting jurisdictional rates); *N. States Power Co. v. FERC*, 176 F.3d 1090, 1094 (8th Cir. 1999) (“[T]he Federal Power Act authorized FERC to examine the entire factual context surrounding the wholesale rates, including facts related to the nonjurisdictional retail transactions”) (citing *FPC v. Conway Corp.*, 426 U.S. 271, 280 (1976)); *Corning Glass Works v. FERC*, 675 F.2d 392, 395-96 (D.C. Cir. 1982) (“It is well settled that the Commission may consider nonjurisdictional activities and transactions . . . when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction.”) (internal quotations omitted).

¹⁹ E.g., *Golden Spread Elec. Coop., Inc. v. Southwestern Pub. Serv. Co.*, 123 FERC ¶ 61,047 (2008) (approving the use of a 12-CP methodology where both retail and wholesale sales were included in the calculation of system peak); *Appalachian Power Co.*, 83 FERC ¶ 61,335 (1998) (including both retail and wholesale sales in system peak for purposes of allocating costs on a non-coincident peak basis).

to wholesale service.²⁰ In doing so, the Commission is not usurping state jurisdiction over retail service, but instead is merely reflecting the entire use of the system in allocating costs to jurisdictional services. These allocators represent a mathematical tool to allocate costs which is then applied to the company's jurisdictional revenue requirement. The fact that these allocators include both wholesale and retail service does not render their use unlawful. The bottom line is that these types of allocators are based on service provided over a transmission system. Just as the Commission considers the whole of a transmission provider's system costs in designing transmission rates, so too can the Commission consider bundled retail load in designing a fair and equitable allocator for its annual fee assessments. As the Courts have recognized the test for rate design is reasonableness.²¹

Of course, once passing the test of reasonableness, the allocators need to be *applied* to a jurisdictional revenue requirement and assessed to jurisdictional public utilities (with the exception noted *infra* concerning reliability program costs). This is

²⁰ See *supra* note 19.

²¹ See, e.g., *FPC v. Hope Natural Gas*, 320 U.S. 591, 602 (1944) (“Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling.”); see also, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968) (“[R]ate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, ‘to make the pragmatic adjustments which may be called for by particular circumstances.’”) (citing *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)); *Ala. Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (stating that courts “may require only that [Commission-approved] rates fall within a ‘zone of reasonableness’”); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697-A, III FERC Stats. & Regs. Preambles ¶ 31,268, at P 425 (2008) (“Under the FPA, the Commission is not bound to a particular ratemaking methodology in setting rates as long as rates fall within a zone of reasonableness.”).

precisely what the IRC seeks in its initial comments – *i.e.* utilizing a reasonable allocator based on reported data which includes bundled and unbundled sales applied to the Commission’s “revenue requirement” for its regulatory program. As discussed above, this is well in keeping with established ratemaking practice and the law. Indeed, the Commission already includes bundled retail load within the allocator when such load is within RTOs and ISOs; there is no barrier to extending comparable treatment outside the RTO/ISO context. In short, the Commission should recognize the jurisdictional arguments for what they are – attempts to cloud the underlying issue and mask the need for reform to remedy what is clearly discrimination and a disincentive to RTO participation.²²

C. Reliability Program Costs Are Properly Assessed to All Users, Owners and Operators of the Grid.

Several commenters fail to recognize that Congress has broadened the Commission’s jurisdiction with respect to reliability²³ and that, as a result, modifying the existing methodology is necessary to ensure that the Commission recovers its reliability-related costs in a fair, equitable and nondiscriminatory manner. The Commission’s annual assessment program is required by the Omnibus Budget Reconciliation Act of 1986 (“Budget Act”) mandate that the Commission “assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission

²² The lack of merit of Southern/Progress’s jurisdictional argument is evidenced by its own pleading where it takes this issue to an extreme. Southern/Progress erroneously argues that the Commission cannot even assess its reliability costs on entities it is regulating for to do so would constitute regulation of bundled load. Southern/Progress Comments at 6-8.

²³ Energy Policy Act of 2005, Pub. L. No. 109-58, § 1211, 119 Stat. 594, 941-46 (2005) (codified at 16 U.S.C. § 824o) (“EPAAct 2005”).

in that fiscal year.”²⁴ In passing the EAct 2005, Congress specifically assigned the Commission jurisdiction over “all users, owners and operators of the bulk-power system, including but not limited to the entities described in section 201(f), for purposes of approving reliability standards established” in the EAct 2005.²⁵ EAct 2005’s reliability mandate applies more broadly than the Commission’s general jurisdiction, and includes entities like Southern, FPL and Portland, as well as traditionally “non-jurisdictional” entities such as government-owned power agencies, since all such entities either use, own or operate the transmission grid. A fair reading of the Budget Act and EAct 2005, coupled with the general principle that cost allocation should follow cost causation, demands that any costs the Commission incurs with respect to reliability obligations imposed by EAct 2005 should be recovered from the entities giving rise to such costs and on whose behalf the Commission is statutorily bound to develop and implement reliability standards. Accordingly, as the IRC proposed in its initial comments, the Commission must develop some mechanism for recovering reliability-related costs from all “users, owners and operators of the bulk power system,” including non-RTO/ISO members and similar entities.

²⁴ 42 U.S.C. § 7178(a)(1).

²⁵ 16 U.S.C. § 824o(b)(1).

CONCLUSION

For these reasons and the reasons expressed in its initial comments, the IRC requests that the Commission develop a Notice of Proposed Rulemaking based on the proposals set forth by the IRC in this docket.

Respectfully submitted,

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