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REGULATORY ALERT BULLETIN

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ORDER NO. 890-B¹

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INTRODUCTION

On June 23, 2008, the Federal Energy Regulatory Commission (“Commission”) issued Order No. 890-B, the third in a series of recent Commission orders amending its open access regulations and Open Access Transmission Tariff (“OATT”).² Order No. 890-B granted rehearing and clarification of Order No. 890-A issued December 28, 2007, which granted rehearing and clarification of the Commission’s Final Rule issued February 16, 2007. This Regulatory Alert Bulletin identifies the extent to which the Commission granted rehearing or clarification of Order No. 890-A. Order No. 890-B largely affirms Order Nos. 890 and 890-A.

Order No. 890-B will become effective 60 days after its publication in the Federal Register.

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² *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007) (“Order No. 890”), *order on reh’g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007) (“Order No. 890-A”), *order on reh’g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) (“Order No. 890-B”).

I. COMPLIANCE

- Transmission providers that have not been approved as independent system operators (“ISOs”) or regional transmission organizations (“RTOs”) and whose facilities are not in the footprint of an RTO or ISO, must submit a Federal Power Act (“FPA”) section 206 filing that contains the revised non-rate terms and conditions of the *pro forma* OATT stated in Appendix B of Order No. 890-B within 60 days of publication of the order in the Federal Register. RTO and ISO transmission providers are directed to submit similar section 206 filings within 90 days of publication of the order in the Federal Register. Order No. 890-B at P 6.

II. REHEARING AND CLARIFICATION ASPECTS OF ORDER NO. 890-B

A. ATC Calculations: Consistency and Transparency

1. Consistency

(a) Necessary Degree of Consistency

- Revised Attachment C filings incorporating reliability standards developed through the North American Electric Reliability Corporation (“NERC”) and business practices developed through North American Energy Standards Board (“NAESB”) are due by each transmission provider within 60 days after the date on which the relevant reliability standards or business practices take effect. Order No. 890-B at P 16.
- If the Commission has previously determined that a particular practice satisfies the obligation of the utility to post available transfer capability (“ATC”) values, then that determination or waiver of that obligation remains intact. Order No. 890-B at P 17.

(b) ATC Components

- Transmission providers must use transmission reserve margin (“TRM”), not capacity benefit margin (“CBM”), for reserve sharing arrangements. Further, transmission providers must make the ATC set aside for reserve sharing arrangements available to all Load-Serving Entities (“LSEs”) on a comparable basis. Order No. 890-B at P 24.

2. Transparency/OASIS

- When an affiliate requests information that is already available to the public, the transmission provider is only required to post a notice that an affiliate requested the particular information, not the actual information itself. Order No. 890-B at P 33.
- Only underlying factors used to make load forecasts that have a significant impact on calculations, such as temperature forecasts, must be posted. Transmission providers must post a description of the load forecast method and include in this method a description of

how economic and weather assumptions are utilized in load forecasting. Order No. 890-B at P 35.

- While a transmission provider need not manufacture or make available modeling data that it does not use in ATC calculations, any specified modeling data actually used for the calculation of ATC or its components must be made available as required in Order No. 890-A. Order No. 890-B at P 36.
- Transmission providers may condition the release of production cost models and generation dispatch methodologies on appropriate confidentiality restrictions if such information is commercially sensitive or contains proprietary information. The transmission provider's merchant and/or generation personnel are to be treated the same as third parties in terms of their right to classify proprietary or commercially sensitive information that they provide to a transmission provider and their right to receive such data from the transmission provider. Order No. 890-B at P 37.

B. Transmission Pricing

1. Energy and Generator Imbalances

(a) Generator Imbalance Penalties

- Order No. 890-A allowed a transmission provider to post on its OASIS the maximum amount of generator imbalance service it is able to offer without impairing reliability. In Order No. 890-B, the Commission clarifies that, to the extent necessary, a transmission provider must post the availability of generator imbalance service and seek imbalance service from other sources in a manner that is reasonable in light of the transmission provider's operations and the needs of its imbalance customers. Order No. 890-B at P 41.
- The transmission provider must accommodate the use of dynamic scheduling if the transmission provider is unable to provide generator imbalance service and the customer has negotiated the appropriate arrangements with the relevant control areas. Order No. 890-B at P 42.

(b) Definition of Incremental Cost

- The definition of incremental cost is changed to use the term "e.g." instead of "i.e." when referring to the types of energy to be included in the incremental cost calculation. Order No. 890-B at P 45.

2. Credits for Network Customers

- As set forth in section 30.9 of the *pro forma* OATT, as revised in Order No. 890, a network customer is eligible for credits if it demonstrates that its facilities are integrated with the operations of the transmission provider's facilities, provided that integration will be presumed for new customer-owned facilities that, if owned by the transmission

provider, would be eligible for inclusion in the transmission provider's annual revenue requirement. Order No. 890-B at P 60.

- If the transmission provider disagrees that the customer-owned facilities are similar in design and purpose to its own facilities, it may challenge the threshold application of the presumption of integration with a comparative analysis of its facilities and those for which credits are claimed. Order No. 890-B at P 64. If the network customer prevails in its claim for presumed integration, then the network customer will be afforded the same rolled-in rate treatment the transmission provider received. Order No. 890-B at P 65.
- None of the reforms regarding transmission credits adopted in Order No. 890 was intended to apply to facilities existing prior to the effectiveness of the revised section 30.9 of the *pro forma* OATT nor to pending cases involving such facilities. Denial of credits to a network customer's previously existing facilities therefore still triggers review of the transmission provider's rate base. Likewise, a network customer cannot rely on the presumption of integration for its previously existing facilities. Order No. 890-B at P 67.

3. Capacity Reassignment

- As set forth in Order Nos. 890 and 890-A, the price cap on reassignments of transmission capacity will be lifted to accommodate a study period expiring on October 1, 2010. Order No. 890-B at P 77.
- During the study period, if a customer believes that: (a) capacity is being preferentially allocated to a transmission provider's affiliates, (b) particular holders of transmission capacity are attempting to exercise market power through hoarding or other tactics, or (c) the transmission provider is not meeting its expansion obligations, the customer may file a complaint or bring the issue before the Commission through other appropriate procedural mechanisms. Order No. 890-B at P 82. If the Commission finds evidence of market abuse, the Commission may restrict the ability of an offending reseller and its affiliates to participate in the secondary market or impose other remedies, including civil penalties. *Id.*
- In Order No. 890-A, the Commission directed FERC Staff to prepare a report on the development of the secondary market for transmission capacity during the study period ending on October 1, 2010. In Order No. 890-B, the Commission clarifies that Staff's report should focus on the competitive effects of removing the price caps for reassigned capacity, including the number of reassignments occurring over the study period, the magnitude and variability of resale prices, the term of reassignments, and any relationship between resale prices and price differentials in related energy markets. In addition, Staff should examine the nature and scope of reassignments undertaken by the transmission provider's affiliates and include in its report any evidence of abuse in the secondary market for transmission capacity. Order No. 890-B at P 83. Upon review of the Staff report, the Commission will decide whether further rulemaking procedures should be

instituted to allow reassignments of transmission capacity above the price cap after October 1, 2010. Order No. 890-B at P 86.

- Transmission providers are directed to include in their Electric Quarterly Reports (“EQRs”) the identity of the reseller and indicate whether the reseller is affiliated with the transmission provider. Each transmission provider must include the rate that would have been charged under its OATT if the secondary customer purchased primary service from the transmission provider for the term of reassignment. These additional data must be submitted for all resales during the study period and transmission providers must update, to the extent necessary, any previously-filed EQRs on or before the date they submit their next EQR. Order No. 890-B at P 84.
- In EQR submissions, transmission providers should not aggregate multiple reassignment transactions into single line items. All terms must be fully described and rates provided for each reassignment. Order No. 890-B at P 85.

4. “Operational” Penalties

- If transmission providers seek to propose study deadlines that differ from those established in the *pro forma* OATT, they may do so pursuant to section 205 of the FPA and demonstrate that alternative tariff provisions are consistent with or superior to the *pro forma* OATT. Order No. 890-B at P 101.

5. “Higher of” Pricing Policy

- If a service agreement identifies particular upgrade costs to be paid by the transmission customer, neither the transmission provider nor the transmission customer can unilaterally change the capital costs specified in that agreement once the customer has signed it. However, the transmission provider and transmission customer can choose to negotiate alternative pricing arrangements, such as recovering estimated costs subject to a later true-up once upgrades are completed. The Commission will review such flexible pricing arrangements on a case-by-case basis. Order No. 890-B at PP 107-08.

6. Other Ancillary Services

- Transmission providers are not required to offer operating reserves under Schedules 5 or 6 of the *pro forma* OATT when transmission is serving load outside the transmission provider’s control area. However, transmission providers in the Western Electricity Coordinating Council (“WECC”) region may file proposed tariff amendments to accommodate the region’s unique market rules that appear to have transferred the obligation to procure operating reserves from transmission customers serving load to those entities providing the resources. On the other hand, the regional market rules could also be amended to reflect the *pro forma* OATT’s structure that places the operating reserves procurement obligation on the load. Order No. 890-B at PP 114-15.

C. Non-Rate Terms and Conditions

1. Modifications to Long-Term Firm Point-to-Point Service

(a) Requirement to Offer Conditional Firm Service

- Customers supporting upgrades, regardless of whether the cost of the upgrades is directly assigned or rolled-in, will not have their upgrades sized based upon the needs of planning redispatch and conditional firm customers that have opted not to support the upgrades. In addition, any excess capacity created by the upgrades should not be automatically allocated to planning redispatch and conditional firm customers earlier in the queue. Rather, should excess capacity exist, transmission providers should file, prior to the completion of the upgrades, proposed tariff provisions designed to address the allocation of that capacity. Order No. 890-B at P 126.

(b) Implementation of Planning Redispatch and Conditional Firm Service

(1) Characteristics of Service

- While the provision of third party planning redispatch requires coordination between the customer, the transmission provider, and the reliability coordinator, the role of the reliability coordinator is very limited. Rather, the transmission customer bears the burden of making the necessary contractual and technical arrangements in order to maintain reliability, and the transmission provider has primary responsibility for overseeing the coordination of third-party redispatch. On the other hand, reliability coordinators play a larger role in reliability redispatch, which, unlike planning redispatch, is used to relieve actual system constraints that would otherwise cause curtailment of network customer or other transmission provider loads. Order No. 890-B at PP 131-33.
- Whether unexpected events should be incorporated into the analysis to determine the number of annual curtailment hours applying in any transmission service agreement depends on the curtailment priority of the service at the time of the event. For instance, if an unexpected event occurs when a conditional firm customer is curtailed due to a firm curtailment priority, then the curtailment will not count against the annual hours. When determining whether annual conditional curtailments are met, transmission providers should count curtailments made when the service is otherwise conditional. Order No. 890-B at P 133.

(2) Pricing of Planning Redispatch

- The Order No. 888 policy of crediting revenues from direct assignment of redispatch costs to the costs of fuel and purchased power expense included in the transmission provider's wholesale fuel adjustment clause is appropriate for all generation-related costs. Further, this rate treatment is appropriate regardless of the pricing mechanism used for planning redispatch, *i.e.*, whether the customer pays the embedded cost transmission rate or the cost of planning redispatch in any particular month. If in a given month the

embedded cost transmission rate is higher than the generation-related costs of providing redispatch, then the revenues in excess of the generation-related costs should be credited against the costs of transmission service. The remaining revenues representing the monthly costs of reconfiguring generation resources should be credited against the fuel adjustment clause. Order No. 890-B at P 138.

2. Rollover Rights

- The Commission revised the language of section 2.2 of the *pro forma* OATT to require customers rolling over their service to accept a contract term at least equal to a competing request. This revision is intended to reflect that the Commission has not modified its existing policy that there would be only one potential competitor for rollover customers seeking long-term service, *i.e.*, the first customer in the queue requesting competing service. In addition, the transmission provider should identify any such competing request consistent with the reservation priorities in the *pro forma* OATT. Order No. 890-B at P 152.
- The pre-Order No. 890 requirement for a one-year contract commitment to obtain rollover rights continues to apply to any customer executing a service agreement prior to the effective date of the relevant transmission provider's revised section 2.2, regardless of when the transmission customer submitted the service request. Order No. 890-B at P 153.
- A transmission provider may file the revised rollover language adopted in the Order No. 890 proceeding at any point after the Commission has accepted the transmission provider's Attachment K compliance filing, even if the acceptance is subject to further compliance obligations. One exception to this rule is if the Commission notes otherwise in its order on the transmission provider's Attachment K proposal. The transmission provider should request an effective date for the revised tariff language that is the same as the date of the filing containing the revised language. Order No. 890-B at P 154.

3. Designation of Network Resources

(a) Qualification as a Network Resource

- The requirement in Section 29.2(v) of the *pro forma* OATT to identify the transmission arrangements on external transmission systems is only required from the point that the network customer takes title to the power to the point of delivery on the transmission provider's transmission system, to the extent those points are distinct. Order No. 890-B at P 169.
- A resource's qualification for network resource status does not necessarily mean that the resource qualifies as firm capacity for resource adequacy purposes. Order No. 890-B at P 175.

(b) Documentation for Network Resources

- Under Section 30.7 of the *pro forma* OATT, a network customer is required to demonstrate that it either (i) owns or has committed to purchase generation pursuant to an executed contract, or (ii) execution of a contract is contingent upon the availability of transmission service in order to designate a generating resource. Under sections 29.2 and 30.2 of the *pro forma* OATT, the network customer must provide an attestation regarding its designated network resources. On rehearing, these sections have been modified to state that the attestation may be submitted when the resource designation is confirmed, rather than requested. Order No. 890-B at P 182.

(c) Undesignation of Network Resources

(1) Risk to ATC Rights

- If a network customer wishes for the transmission provider to take a request to terminate a network resource into account at the same time the network customer is requesting to designate another network resource, the customer may request that the transmission provider cluster the requests. However, clustering the studies will not alter the priority of the network customer with regard to ATC made available by undesignating the network resource. Order No. 890-B at P 189.

(2) System Sales

- The exception outlined in Order No. 890-A that a seller need not undesignate capacity supporting a system sale on a resource-by-resource basis for system sales designated as network resources by the buyer applies only to transactions where the seller and the buyer are located on the same transmission system. Order No. 890-B at P 205.

(3) Reserve Sharing

- The Commission eliminated the requirement that a reserve sharing program be Commission-approved in order for a network customer to use a designated network resource to meet its reserve sharing obligation. However, the Commission modified sections 1.26 and 30.4 of the *pro forma* OATT to state that a reserve sharing program must limit sharing of contingency reserves to emergencies, and does not extend to other types of third-party sales. In addition, any use of designated network resources for reserve sharing events will be subject to justification during an audit. Order No. 890-B at P 215.

4. Clarifications Related to Network Service

- There is no *per se* prohibition on a transmission customer using both point-to-point and network transmission service. However, any use of point-to-point service by a network customer does not decrease the size of the network customer's load for the purposes of calculating its load ratio share payment obligations (except to the extent the discrete load

being served has been completely excluded from network service). In addition, Order No. 890-A did not modify a transmission provider's obligation under section 28.2 of the *pro forma* OATT to construct and place into service sufficient transfer capability to deliver the network customer's network resource to serve network load on a basis comparable to that of the transmission provider's delivery of its own resources to its native load customers. Order No. 890-B at P 219.

5. OATT Definitions

- Section 30.4 of the *pro forma* OATT is amended to restrict the operation of a network customer's designated network resources such that the output of the facility does not exceed the sum of the customer's load, non-firm sales, losses, and sales under a reserve sharing agreement. The transmission provider or network customer is prohibited from using a designated resource for third-party sales that do not fall within one of the specified categories. Order No. 890-B at P 234.
- Section 30.4 is also amended to make it clear that designated network resources may be used to support sales that permit curtailment without penalty to serve the seller's native or network load. Order No. 890-B at P 240.