

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

**Preventing Undue Discrimination
And Preference in Transmission Services**

**Docket Nos. RM05-25-000
RM05-17-000**

REPLY COMMENTS OF THE CANADIAN ELECTRICITY ASSOCIATION

Pursuant to the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. Part 385 (2002), and the Commission’s Notice in Docket No. RM05-25-000, the Canadian Electricity Association (“CEA”) respectfully submits these reply comments regarding the Commission’s Notice of Proposed Rulemaking on Preventing Undue Discrimination and Preference in Transmission Services.¹

Background

On May 19, 2006, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a Notice of Proposed Rulemaking (“NOPR”) on regulations relating to Order Nos. 888 and 889, proposing to reform the pro forma Open Access Transmission Tariff (“OATT”) to address deficiencies identified since the OATT was developed in 1996. One of the issues addressed in the NOPR is the obligation of non-public utilities to provide transmission service pursuant to the reciprocity provisions of the OATT and also pursuant to the Commission’s authority under newly enacted Section 1231 of the Energy Policy Act of 2005 (“EPAAct”). FERC proposes in the NOPR to retain the current reciprocity provisions in the pro

¹ The Canadian Electricity Association is the national forum and voice of the evolving electricity business in Canada. At the heart of the Association is a core of corporate utility member companies accounting for the vast majority of Canada’s installed generating capacity and virtually all its transmission capacity. In addition, major electrical manufacturers and corporate consulting companies and several hundred other companies and individual members are grouped within CEA’s broad structure. One CEA member, Newfoundland and Labrador Hydro, does not join in these comments.

forma OATT, as well as the existing requirements for satisfying the reciprocity condition. The Commission also proposes to apply the new EPAct language on a case-by-case basis, such as when a public utility seeks service from an unregulated transmitting utility that has not requested service under the public utility's OATT, rather than imposing the requirement on all unregulated transmitting utilities through a rulemaking proceeding.

Prior to the issuance of the NOPR, FERC had issued a Notice of Inquiry requesting comments on whether reforms were needed to the OATT. CEA had submitted comments in response to the Notice of Inquiry regarding the need to revise the "comparability" requirement in the reciprocity provisions of the OATT as it applies to Canadian utilities should the Commission exercise its authority over U.S. non-public utilities under the EPAct. Because FERC chose not to exercise its EPAct authority, CEA found it unnecessary to submit comments regarding the NOPR. However, comments submitted by the Edison Electric Institute ("EEI") urging the Commission to reconsider its position on reciprocity require a response from CEA. As explained below, CEA requests that FERC revise the comparability requirement as it applies to Canadian utilities under reciprocity to the extent FERC accepts EEI's proposal to implement Section 1231 of EPAct. With regard to EEI's alternative proposal to expand the scope of the reciprocity requirement, for the reasons stated below, CEA requests that the Commission reject this proposal.

Comments

In EEI's comments, EEI "strongly urges" FERC to reconsider its decision not to alter the reciprocity approach. *Comments of the Edison Electric Institute*, Docket Nos. RM05-25 and RM05-17, p. 23. EEI proposes that FERC "implement the explicit authority granted to it by Congress to require unregulated transmitting utilities to provide comparable, non-discriminatory

open access transmission services.” *Id.* In the alternative, EEI suggests that the reciprocity obligation be strengthened. *Id.* Among the proposals to strengthen this obligation is to require non-public utility transmission providers to provide transmission services to all "Eligible Customers." *Id.* at 23-25. EEI further states that “the Commission should reaffirm that the reciprocity obligation is binding on Canadian utilities.” *Id.* at 29.

As CEA explained in its comments in response to FERC’s initial Notice of Inquiry, if FERC were to apply the new open-access authority it received under section 1231 of EPAct, the comparability requirement would change for U.S. non-public utilities, so that there would be a change in treatment of U.S. versus foreign electricity. A U.S. non-regulated transmitting utility would no longer be required to have in place terms and conditions that substantially conform or are superior to those in the public utility’s pro forma tariff. Instead, the unregulated transmitting utility would only have to provide open access “on term and conditions ... that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory and preferential.” Section 1231 of the Energy Policy Act (emphasis added). To the extent FERC changes the terms and conditions required with respect to unregulated transmitting utilities in the U.S., it must apply those same changes to Canadian utilities.

When FERC first proposed the application of the reciprocity requirement to Canadian utilities in Order No. 888, the policy was challenged as a violation of NAFTA’s national treatment principle. FERC recognized in Order No. 888 that national treatment requires that the United States “must not discriminate between foreign and domestic energy on the basis of nationality and that Canadian electricity must be treated no less favorably than U.S. electricity, under all U.S. laws and rules respecting the sale, distribution, and use of electricity.” *Promoting*

Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Order No. 888-A, ¶ 31,048, 30,291 (1997). The Commission concluded in Order No. 888 that the imposition of reciprocity would not result in less favorable treatment accorded to Canadian entities because the same condition that applies to non-public utilities would apply to foreign utilities. *Id.* “[W]e are simply placing the same condition on a Canadian entity’s use of a United States utility’s open access tariff as on a domestic non-public utility’s use of that tariff... [W]e are simply placing the same reasonable and fair condition on both types of entities’ uses of the transmission order in the Final Rule.” *Id.* at 30,292.

The Commission concluded that the national treatment principle of NAFTA would not be violated as a result of the imposition of the reciprocity requirement of Order No. 888 because the same conditions applied to foreign utilities as applied to U.S. non-public utilities. However, to the extent FERC implements section 1231 of EPAct, the “terms and conditions” for purposes of domestic non-public utilities providing open-access would be the terms and conditions a particular non-public utility imposes on itself. The Commission’s application of this new statutory standard to domestic non-public utilities, without corresponding changes to the manner in which open access must be provided by Canadian entities under the non-jurisdictional tariffs, will result in domestic non-public utilities being treated better than Canadian entities and would therefore violate the national treatment obligations under NAFTA as FERC has interpreted this NAFTA requirement. To ensure that Canadian entities are treated no less favorably than domestic non-public utilities, the comparability requirement must be changed to require that a Canadian entity that seeks open access in the U.S. must provide access to its own transmission system under “terms and conditions” that are comparable to those the Canadian entity is subject to itself.

With respect to EEI's suggestion to strengthen the reciprocity obligation so as to require the offering of transmission service to all Eligible Customers, the effect of such a move would be to undermine Canadian jurisdictional sovereignty. The NOPR defines "Eligible Customers" as “[a]ny electric utility (including the Transmission Provider and any power marketer), Federal Power marketing agency, or any person generating electric energy for sale for resale.” *NOPR*, Appendix B, Original Sheet No. 13. In addition, the OATT provides that electric energy sold or produced by such entity may be electric energy produced in the United States, Canada, or Mexico. *Id.* The effect of EEI's proposed "strengthening" of the reciprocity obligation would be to enable a generator generating power in Canada to obtain open access on a Canadian utility's transmission system.

Under the current reciprocity requirement, non-jurisdictional public utilities (i.e., Canadian transmission owners) do not have to offer an open access tariff applicable to all users. *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Order No. 888-A* at 30,291. Instead, such a non-jurisdictional public utility must offer comparable transmission services only to those transmission providers whose transmission facilities are used by such non-jurisdictional public utility. *Id.* “Under the reciprocity condition, non-public utilities do not have to offer an open access tariff (i.e., a tariff that offers transmission service to any eligible customer), but rather must offer comparable transmission services only to those transmission providers whose open access tariffs the non-public utility uses.” *Id.*

The Commission established a safe harbor procedure in Order No. 888, under which non-public utilities may voluntarily submit to the Commission a reciprocity transmission tariff. *Basin Electric Power Cooperative, Inc.*, 102 FERC ¶ 61,253, 61,778 (2003). But even under the safe

harbor procedures, non-jurisdictional applicants need not submit an open access tariff that applies to all customers that would otherwise be eligible for service under the OATTs.

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Service by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888-B, 81 FERC ¶¶ 61,248, 62,078 (1997). Instead, a non-public utility may meet reciprocity requirements under the safe harbor procedures by agreeing to provide service only to the transmission providers from whom the non-public utility obtains open-access transmission service. *Id.*

The reciprocity requirement was developed to apply in circumstances where non-U.S. utilities seek to use open access transmission on a U.S. public utility's system. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Service by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888 at 31,762. EEI's proposed "strengthening" of the reciprocity requirement would enable any Eligible Customer seeking transmission access to be provided open access on the system of a Canadian transmission owner, regardless of whether the Canadian entity is seeking transmission access on the Eligible Customer's transmission system or even whether the Eligible Customer has a transmission system. Since "Eligible Customers" include persons generating electric energy in Canada, the effect would be to require all Canadian entities that have filed reciprocity tariffs to provide open access service to all entities seeking such service, even entities located in Canada.

The principles of comity require the recognition of the dominion exercised by Canadian regulators over Canadian entities. In Order No. 888, the Commission conceded the need for some level of deference in implementing reciprocity requirements with respect to foreign

