

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

**Notice of Inquiry on Preventing Undue Discrimination
And Preference in Transmission Services**

Docket No. RM05-25-000

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 comments regarding the Commission’s Notice of Inquiry on Preventing Undue Discrimination and Preference in Transmission Services.¹

Background

On September 16, 2005, FERC issued a Notice of Inquiry requesting comments on whether reforms are needed to the Order No. 888 pro forma open access transmission tariff (“OATT”). Among the issues the Commission is seeking comment on are questions relating to the implementation of FERC’s new authority to require that unregulated transmitting utilities provide open access transmission service.

In Order No. 888, FERC recognized that it did not have the authority to require non-public utilities to file open access transmission tariffs with the Commission. However, FERC concluded that “it is appropriate to require a reciprocity provision in the Final Rule pro forma

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.

tariff.” *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, *FERC Stat. & Regs.* ¶ 31,036, 31,760 (1996). The reciprocity requirement is included in open access tariffs (“OATTs”) on file with the Commission. But FERC did not limit the application of reciprocity to just U.S. unregulated transmitting utilities, such as municipal systems and rural electric cooperatives. Instead, FERC imposed reciprocity north of the border, requiring Canadian utilities that sought to utilize U.S. transmission facilities to comply with the reciprocity requirement. *Id.* at 31,762. “[A] foreign entity that owns or controls transmission facilities and that takes transmission service under a United States public utility’s open access tariff must comply with the reciprocity provision in the tariff.” *Id.* at 30,290.

Under the reciprocity requirement, non-jurisdictional public utilities (i.e., Canadian transmission owners) do not have to offer an open access tariff applicable to all users. *Id.* 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.*

In terms of the “comparability standard,” 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. Such entities file requests for a declaratory order asking FERC to determine that the tariff meets the Commission’s comparability (non-

discriminatory) standards. *Basin Electric Power Cooperative, Inc.*, 102 FERC ¶ 61,253, 61,778 (2003). “If the Commission finds that such a tariff contains terms and conditions that substantially conform or are superior to those in the pro forma open access transmission tariff contained in Order No. 888 (pro forma tariff), the Commission will deem it to be an acceptable reciprocity tariff and will require public utilities to provide open-access transmission service upon request to that particular non-public utility.” *Id.* at 61,778-779.

Section 1231 of the Energy Policy Act has altered the jurisdictional framework and provides FERC with clear authority to impose open access requirements on unregulated transmitting utilities in the U.S. Thus, the Commission no longer needs to rely on the indirect and incomplete authority provided by reciprocity with respect to these entities. However, Section 1231 has also altered the comparability requirement by providing that the Commission may require the unregulated transmitting utility to provide transmission services “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.” (emphasis added)

Comments

The Energy Policy Act included language that now provides FERC with the authority to require unregulated transmitting utilities in the U.S. to provide open access transmission service by either rule or order. In the Notice of Inquiry, FERC is seeking comments on whether it should require by rule that unregulated transmission utilities provide open access transmission service “under terms and conditions that are comparable to those they apply to themselves and that are not unduly discriminatory or preferential.”

Given that FERC now has the authority to require U.S. non-regulated transmitting utilities to provide open access and given that the “comparability” requirement has changed with respect to such utilities, the Commission is required to revisit the reciprocity requirement of Order No. 888, at least with respect to domestic unregulated transmitting utilities. The comparability requirement no longer requires that the unregulated transmitting utility 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 only has to include terms and conditions that are comparable to those it applies to itself. Accordingly, FERC must change the terms and conditions requirement with respect to unregulated transmitting utilities in the U.S., whether by rule or order.

FERC makes no mention of Canadian utilities in its Notice of Inquiry. However, CEA believes that FERC must also reconsider the comparability requirement under reciprocity as it is applied to Canadian entities.

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 reciprocity conditions applied to foreign utilities as applied to U.S. non-public utilities. However, section 1231 of the Energy Policy Act has changed the application of such conditions by granting FERC some jurisdiction over U.S. non-public utilities and mandating that the “terms and conditions” for purposes of domestic non-public utilities must be the terms and conditions a particular 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 the reciprocity requirement currently applies to Canadian entities, will result in the domestic unregulated transmitting utilities being treated better than Canadian entities and would violate the national treatment obligations under NAFTA as FERC has interpreted this NAFTA requirement.

FERC relied on the fact that the same condition was imposed on both U.S. and foreign non-jurisdictional entities to support its finding that the NAFTA national treatment requirement was not violated. With the statutorily-mandated changes in the “terms and conditions” requirement for domestic non-public utilities, the same condition that currently applies to foreign utilities will no longer apply to domestic non-public utilities. To ensure that Canadian entities are treated no less favorably than domestic non-public utilities, the reciprocity requirement under Order No. 888 must be modified. To that end, the comparability requirement must be changed to

