

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;  
William L. Massey, and Linda Breathitt.

Avista Corporation,  
Bonneville Power Administration,  
Idaho Power Company,  
Montana Power Company,  
Nevada Power Company,  
PacifiCorp,  
Portland General Electric Company,  
Puget Sound Energy, Inc.,  
Sierra Pacific Power Company

Docket No. RT01-35-000

Avista Corporation,  
Montana Power Company,  
Nevada Power Company,  
Portland General Electric Company,  
Puget Sound Energy, Inc.,  
Sierra Pacific Power Company

Docket No. RT01-15-000

ORDER GRANTING, WITH MODIFICATION, RTO WEST  
PETITION FOR DECLARATORY ORDER AND  
GRANTING TRANSCONNECT PETITION FOR DECLARATORY ORDER

(Issued April 26, 2001)

**Introduction**

On October 16, 2000, as supplemented on October 23, 2000, and amended on December 1, 2000, Avista Corporation (Avista), Bonneville Power Administration (Bonneville), Idaho Power Company (Idaho Power), Montana Power Company (Montana Power), Nevada Power Company (Nevada Power), PacifiCorp, Portland General Electric Company (PGE), Puget Sound Energy, Inc. (Puget Sound), and Sierra Pacific Power Company (Sierra Pacific) (collectively referred to as RTO West Applicants) filed in Docket No. RT01-35-000 a proposal to form a regional transmission

organization, RTO West. RTO West will be a nonprofit organization with an independent board that will act as the independent system operator for the aggregated transmission systems of participating transmission owners. Upon initial operation, RTO West will not own any transmission facilities but will control each participating transmission owner's transmission facilities.

Furthermore, on October 16, 2000, Avista Corporation, Montana Power Company, Nevada Power Company, Portland General Electric Company, Puget Sound Energy, Inc., and Sierra Pacific Power Company (collectively referred to as the TransConnect Applicants) filed in Docket No. RT01-15-000 a proposal to establish an independent transmission company, TransConnect, LLC (TransConnect) which will be organized as a for-profit limited liability company. Those participating in TransConnect will exchange their transmission assets for a passive ownership interest in the company. TransConnect Applicants indicate that they intend to participate in RTO West as a single transmission owner by transferring control over its transmission assets to RTO West.

In this order, we address several of the issues raised by these filings, including governance and scope. On these issues, we will grant on a preliminary basis and with the conditions and modifications discussed herein, the requests for declaratory orders by the RTO West Applicants and by the TransConnect Applicants.

### **Background**

In Order No. 2000, the Commission established a collaborative process for utilities to facilitate the creation of regional transmission organizations (RTO).<sup>1</sup> Pursuant to that directive, stakeholders in the Pacific Northwest participated in an intensive collaborative process during 2000. As detailed in the RTO West October 23, 2000 filing, this process included stakeholders and interested parties from the northwestern United States, British Columbia and Alberta, Canada, and the western United States. This process built upon earlier efforts in 1996 through 1998 to attempt to establish

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<sup>1</sup>Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 30,092 (2000), review pending sub nom., Public Utility District. No. 1 of Snohomish County, Washington v. FERC, Nos. 00-1174, et al. (D.C. Cir.).

IndeGo, an independent grid operator in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Nevada, and Colorado.<sup>2</sup>

### RTO West Filings

The RTO West October 23 filing includes a general description of the proposed characteristics and functions of RTO West, including the governance structure, the transfer charges proposal, and the allocation of firm transmission rights by RTO West. Furthermore, the filing includes a request for a declaratory order:

- (1) approving the RTO West Articles of Incorporation and Bylaws;
- (2) determining that the proposed scope and configuration of RTO West satisfies Order No. 2000;
- (3) approving the form of Agreement Limiting Liability among RTO West Participants; and
- (4) finding that the concepts underlying the Transmission Operating Agreement and the Agreement to Suspend Provisions of Pre-Existing Transmission Agreements are acceptable.<sup>3</sup>

The filing is described as a Stage 1 filing, which would be followed by a Stage 2 filing in spring 2001. The Stage 2 filing would seek approval of the RTO West Tariff; various forms of Agreement among RTO West and market participants to implement the RTO West arrangements; a schedule of transfer charges; and the allocation of firm transmission rights. With the filing of these agreements, RTO West Applicants assert that the Commission should be able to grant approval of the remaining characteristics and functions of RTO West.

On December 1, 2000, certain of the RTO West Applicants submitted an amendment to the filing, including a revised Transmission Operating Agreement and

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<sup>2</sup>See RTO West Application at 16-28 and Appendix C.

<sup>3</sup>Only three of the RTO West Applicants requested such preliminary review. They noted that these agreements were still undergoing internal review among utilities and that an amendment would be filed including the results of such review by December 1, 2000. As noted below, this filing was submitted on December 1, 2000.

Agreement to Suspend Provisions of Pre-Existing Transmission Agreements.<sup>4</sup> This filing will be addressed in a future order except as noted below.

### TransConnect Filing

The TransConnect filing includes a proposal to establish an independent transmission company (ITC), consisting of TransConnect, and TransConnect Corporate Manager, Inc. (Corporate Manager). The filing includes a description of the governance structure and functions that TransConnect proposes to undertake, related to rate filings and transmission and expansion. TransConnect requests that the Commission issue a declaratory order by December 15, 2000, finding that the proposed TransConnect ITC will meet or exceed the minimum requirements for independence and that the functions that TransConnect proposes to undertake are acceptable.

### Motions to Intervene, Notices of Intervention, and Protests

#### A. Docket No. RT01-35-000

Notices of the RTO West October 16 and October 23, 2000 filings in Docket No. RT01-35-000 were published in the Federal Register at 65 Fed. Reg. 64,209 (2000) and 65 Fed. Reg. 64,693 (2000), respectively, with answers, motions to intervene and protests due on or before November 20, 2000. Timely motions to intervene, notices of intervention, protests, and comments were filed by the parties listed on Appendix A. Motions to intervene out of time were filed by the parties listed on Appendix B. Also listed on Appendix B are parties that filed late comments and protests.

On December 5, 2000, the RTO West Applicants filed an answer to motions to consolidate of Powerex and Northwest IPPs/Marketers Group. The filing also includes a request for waiver of Rule 213 of the Commission's Rules of Practice and Procedure, in order to allow RTO West Applicants to file an answer to the protests to the RTO West October 23, 2000 filing. On December 20, 2000, the Consumer-Owned Utilities filed an answer opposing in part the request for waiver of Rule 213. Consumer-Owned Utilities do not oppose Commission acceptance of those portions of RTO West Applicants' answer addressing the Stage 2 process and cost benefit analysis, scope and configuration, and the RTO West membership fee. Consumer-Owned Utilities also request that the Commission consider its own further comments on these issues. On January 4, 2000, the

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<sup>4</sup>The December 1 Amendment was submitted by Avista, Bonneville, Idaho Power, Montana Power, PacifiCorp, and Puget Sound (Concurring Utilities).

Northwest IPPs/Marketers Group filed a response to the RTO West Applicants' December 5 answer and requested waiver of Rule 213 of the Commission's rules to the extent it would otherwise prohibit a reply.

On February 12, 2001, RTO West and TransConnect Applicants submitted a letter requesting that the Commission act as soon as practicable on the RTO West and TransConnect Stage 1 filings.

**B. Docket No. RT01-15-000**

Notice of the TransConnect filing in Docket No. RT01-15-000 was published in the Federal Register, 65 Fed. Reg. 64,215 (2000), with answers, motions to intervene and protests due on or before November 20, 2000. Timely motions to intervene, notices of intervention, protests, and comments were filed by the parties listed on Appendix C. Barrick Goldstrike Mines, Inc. filed a request to intervene out of time on November 21, 2000. Also on that date, Washington Utilities and Transportation Commission requested leave to file its comments one day out of time.

On December 5, 2000, TransConnect Applicants filed an answer to motions to consolidate of Powerex and Northwest IPPs/Marketers Group, protests and comments. The answer also includes a request for waiver of Rule 213 to the extent it would otherwise prohibit an answer to protests and comments. On December 20, 2000, the Consumer-Owned Utilities filed an answer opposing TransConnect's request for waiver of Rule 213, but only as to the issues raised in Consumer-Owned Utilities' protest.

**Discussion**

**I. Procedural Matters**

**A. Motions to Intervene, Protests, Comments, and Answers**

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, notices of intervention and timely, unopposed motions to intervene serve to make the intervenors listed on Appendices A and C parties to these proceedings. Given the early stage of the proceedings, the interests of the entities, and the absence of undue delay or prejudice, we find good cause to grant the untimely, unopposed motions to intervene as listed in Appendices B and C.

Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2000), generally prohibits answers to protests, unless otherwise ordered

by the decisional authority. We will accept RTO West Applicants' and TransConnect Applicants' answers because they clarify the issues and aid us in the decisional process. For these reasons, we find good cause to accept Consumer-Owned Utilities' and Northwest IPPs/Marketers Group Northwest's further comments.

### **B. Scope of the Commission Order**

RTO West Applicants describe both their October 23, 2000 and their December 1, 2000 filings as Stage 1 of the proposal, for which RTO West Applicants seek preliminary guidance on certain issues. Similarly, TransConnect Applicants explain that they seek initial Commission approval of the governance and shared functions with RTO West, and do not expect final approvals until after further details of the proposal have been completed and submitted for filing.

Many intervenors seek assurance that they will be afforded sufficient opportunity to review and comment on these proposals as they evolve, and that the Commission will not issue a final order until after these proposals are completed and all comments have been submitted.

#### Answers of RTO West Applicants and TransConnect Applicants

RTO West Applicants reiterate that they seek Commission guidance regarding governance of RTO West, the scope and configuration of RTO West, and the Agreement Limiting Liability Among RTO West Participants. RTO West Applicants suggest that in view of the December 1, 2000 amendment to the Transmission Operating Agreement and the Suspension Agreement, the Commission should provide a further opportunity to comment or protest before it addresses the Applicants' request for preliminary guidance on these agreements. RTO West Applicants further respond that all other issues will be addressed in connection with the Stage 2 filing.

Similarly, TransConnect Applicants state that they recognize that additional actions are necessary to finalize the ITC, including business decisions by the management of each company to join TransConnect and seeking approvals from state regulatory authorities, and that they do not intend to avoid these actions. However, TransConnect Applicants state that they require preliminary Commission review to ensure that their proposal is viable before proceeding.

### Commission Response

As noted above, although RTO West and TransConnect have made substantial progress on developing an RTO proposal for the Pacific Northwest, the filings we address today seek preliminary guidance on certain limited issues. Accordingly, this order provides preliminary guidance with respect to Governance, Scope and Configuration, and Liability of RTO West. In addition, we address TransConnect's October 16, 2000 filing only as to the proposed governance structure, its proposal to file rates unilaterally, and its proposed transmission planning and expansion function. As further changes to these proposals are submitted to us for review, we will afford all interested parties an opportunity to comment, and we will address remaining issues in a subsequent order.

### **C. Cost Benefit Analysis**

A number of parties state that the Commission should not issue a declaratory order regarding RTO West without substantial evidence that expected benefits will clearly and substantially outweigh any costs. Seattle also recommends that the Commission require RTO West Applicants to demonstrate that RTO West would improve the efficiency of new transmission and generation siting. The RTO West Applicants oppose the request for a cost benefit analysis.

Similarly, with respect to the TransConnect proposal, Snohomish County asserts that in order for the Commission to approve TransConnect, the record must contain substantial evidence demonstrating that TransConnect would provide substantial consumer benefits.

### Commission Response

In Order No. 2000, the Commission found that the benefits of RTO formation overall outweigh the costs, but it did not require individual cost benefit analyses in compliance filings.<sup>5</sup> We will not reverse that determination here. Moreover, the recent market problems experienced by California and throughout the West underscore the regional nature of the electric marketplace and highlight the substantial benefits that a regional transmission organization will provide.<sup>6</sup>

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<sup>5</sup>Order No. 2000 at 31,017, 31,036.

<sup>6</sup>We note that RTO West Applicants are undertaking further study of the benefits  
(continued...)

#### **D. Other Procedural Matters**

Washington Utilities and Transportation Commission urges the Commission to avoid initiating a formal process and litigation to resolve issues where consensus was not reached. Instead, it requests guidance from the Commission. We agree and will not establish formal hearing procedures at this early stage of the proceeding.

Powerex and Northwest IPPs/Marketers Group request consolidation of the RTO West and TransConnect filings. The RTO West Applicants and TransConnect Applicants oppose the request as unnecessary and because it may unduly complicate the proceedings. While there are many related issues, we will deny the request for consolidation at this time. Because we are not setting these matters for hearing, no purpose would be served by consolidating the proceedings at this time.

BC Hydro requests that it be permitted to participate on the same basis as the RTO West Applicants in developing the RTO West Stage 2 proposal. City of Seattle requests that the open public process be continued, and that participants be afforded the right to review documents before they are submitted for filing. Deseret requests that it be afforded more participation rights in the Stage 2 process. Wyoming Industrial Energy Users, EPSA, and Northwest IPPs/Marketers Group recommend that the Commission require that future RTO West filings be made by the RTO West Board of Trustees.

In response, RTO West Applicants state that they intend to consider the unique issues raised by British Columbia participation in RTO West and discuss with BC Hydro the manner of its participation in Stage 2. With respect to City of Seattle's request, RTO West Applicants state that they do intend to continue to assure public involvement in the process. However, they believe it is inconsistent with the voluntary process for the Commission to dictate the manner in which the Applicants provide for participation by these entities during Stage 2 development. RTO West Applicants oppose the request to require an independent RTO West Board of Trustees to make all future RTO West filings, since this would delay the process until after the RTO West Board selection process takes place.

We find that the RTO West Applicants have adequately responded to these concerns. As noted above, the RTO West Participants have engaged in an open and

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<sup>6</sup>(...continued)

and costs of forming RTO West. See RTO West web page at [www.rto west.com/stage2\\_RRG\\_PAST\\_Feb23mtg.htm](http://www.rto west.com/stage2_RRG_PAST_Feb23mtg.htm).

inclusive process thus far and we do not see the need at this time to dictate the Stage 2 process. Furthermore, an open public process has been established for the remainder of the RTO West proposal.<sup>7</sup> While we urge the prompt implementation of the RTO West governance structure and selection of the RTO West Board of Trustees, we agree with RTO West Applicants that further filings should not be delayed pending these developments. In order to meet with the Commission's timetable for commencement of RTO operations, it is important that the filings necessary to complete the RTO West proposal not be deferred. Under these circumstances, we agree with RTO West that it would be premature at this time to require the RTO West Board of Trustees to make all future RTO West filings.

## **II. Substantive Issues**

The participants in the development of the RTO West Stage 1 proposal took part in an inclusive and wide ranging collaborative process. As a result of these efforts, the parties appear to have successfully overcome many obstacles to developing a well defined, detailed proposal. We commend the participants for these efforts. We are mindful of the many difficult decisions that the various market participants have had to make, and of the fact that there will continue to be contentious issues to address. We urge the participants to continue to maintain their cooperative, constructive approach to their negotiations in their continued development of the RTO West and TransConnect proposals. We discuss below the various requests for declaratory relief.

### **A. RTO West Governance Proposal**

#### **1. Description of the Proposal**

The RTO West Applicants seek approval of their governance proposal, which is contained in the RTO West Articles of Incorporation and Bylaws. Under this proposal, RTO West members will belong to one of five classes, which will then (1) elect a thirty-member Trustee Selection Committee for purposes of voting for a slate of candidates for the RTO West Board of Trustees, and (2) have rights to join a RTO West Board Advisory Committee to advise and present proposals to the RTO West Board of Trustees. Furthermore, under the governance proposal, RTO West will be run by a nine-member, non-stakeholder Board of Trustees, acting as an independent system operator. The governance proposal contains conflict of interest provisions and a Code of Conduct applicable to officers, employees and Trustees of RTO West.

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<sup>7</sup>See RTO West's web site, [www.RTOWEST.com/STAGE2INDEX.HTM](http://www.RTOWEST.com/STAGE2INDEX.HTM).

a. Board Selection ProcessMember Classes

RTO West Applicants propose to establish the following five RTO member classes:

- Major Transmitting Utilities;
- Transmission Dependent Utilities (TDUs);
- Non-utility Entities;
- Retail Customers; and
- State and Provincial Energy Authorities and Utility Commissions/Tribal Utility Regulatory Authorities/Unaligned Entities (State and Provincial Energy Authorities)

The members of each class will have the right to: (1) elect members of a Trustees Selection Committee; (2) be a member of a Board Advisory Committee; (3) amend certain provisions of the Articles of Incorporation and Bylaws; and (4) approve dissolution of the RTO. Member meetings will be open and publicly noticed. The RTO West Bylaws require that the Board of Trustees reexamine the appropriateness of the structure and composition of the RTO West member classes not less than once every five years.<sup>8</sup>

The Member Classes will elect a thirty-member Trustees Selection Committee, which will, in turn, select the RTO West Board of Trustees. Each member class is entitled to elect six representatives to the Trustees Selection Committee. The Trustee Selection Committee members will have staggered terms of three years. The initial Selection Committee will draw straws to divide into three initial groups, of which one group will serve a one-year term, one group will serve a two-year term, and one group will serve a three-year term.<sup>9</sup>

The RTO West Bylaws provide that for the TDU member class, two of the six Trustees Selection Committee members will be elected using a weighting based on each member's load (load-weighted election). The remaining four members of the Trustees Selection Committee for the TDU member class will be elected based on a one member, one vote system; however, members comprising fifty percent or more of the voting

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<sup>8</sup>RTO West Application, Attachment K at 1.

<sup>9</sup>RTO West Application, Attachment J at 17-20.

power in the load-weighted election are not permitted to participate in the one member one vote process..

### RTO West Board of Trustees

The RTO West Board of Trustees will be an independent, non-stakeholder Board, composed of nine members. The nominees to the Board of Trustees will be drawn from a slate of candidates to be developed by one of three designated executive search firms. For the first election of Trustees, the search firm will assemble a slate of 12-15 qualified candidates for nine open positions. The members of the Board of Trustees will be elected by the affirmative vote of not less than 24 of the 30 members of the Trustees Selection Committee. Members of the Trustees Selection Committee need not vote by class.<sup>10</sup> For subsequent annual elections of Trustees, the executive search firm must provide a slate of candidates consisting of at least twice the number of Board vacancies (less any vacancies for which the incumbent Trustee is running for re-election).

Each Trustee will serve a three-year term (except in case of the initial Board of Trustees which will draw straws to divide into three initial classes, with one class serving a one-year term, one class serving a two-year term and one class serving a three-year term). Trustees may be re-elected for an unlimited number of additional terms. The Board of Trustees will act by majority vote except where otherwise specified in the RTO West Bylaws (e.g., not less than two-thirds of Trustees required to approve removal of a Trustee). Board meetings will be open to the public, and agenda and briefing papers for any Board meeting are required to be made available for public review and comment for a specified time prior to an applicable meeting, except in cases of emergency.

The RTO West Bylaws provide for the removal of a Trustee at any time (1) without cause, by the affirmative vote of not less than 24 members of the Trustee Selection Committee (i.e., the same number of votes required to elect a Trustee); or (2) with cause by the affirmative vote of not less than 20 members of the Trustee Selection Committee or at least two-thirds of the Trustees then in office.<sup>11</sup>

#### b. Board Responsibilities

The RTO West Board of Trustees has the ultimate responsibility for the management of RTO West, including appointment of all RTO West officers. It will

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<sup>10</sup>Id. at 18-19.

<sup>11</sup>Id. at 30.

delegate management authority in specific areas to RTO West officers and define limits of such authority. The Board of Trustees may appoint standing or ad hoc committees to assist it in performing its functions.

The RTO West Board of Trustees' is also responsible for developing and implementing policies prescribing limits on the ownership by trustees, officers or employees of RTO West of financial interests in RTO West or entities that provide services to RTO West.<sup>12</sup> The Board of Trustees is also responsible for ensuring that Trustees comply with the RTO West Code of Conduct. These policies are intended to ensure the independence of Trustees, offices and employees of RTO West from market participants.<sup>13</sup> RTO West will retain an independent compliance auditor with authority to obtain information necessary to determine whether each Trustee is in compliance with the Bylaws and the RTO West Code of Conduct. Furthermore, each Trustee, officer and employee of RTO West is required to file an annual compliance affidavit with the independent compliance auditor. The independent compliance auditor will report to the Audit Committee of the Board information that leads it to believe that any Trustee, officer or employee of RTO West is not in compliance with the RTO West Bylaws.

c. Board Advisory Committee

RTO West Board Advisory Committee membership is open to any RTO West member and the Board Advisory Committee will not have a fixed size. Board Advisory Committee members will neither be elected nor divided into classes.

The Board Advisory Committee will serve a purely advisory function and will not be entitled to vote on any issues. Its role will be to provide advice to the Board of Trustees, to promote input on Board of Trustee decisions and to provide a focal point for dissemination of information.

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<sup>12</sup>Id. at 37-38.

<sup>13</sup>The specific policies and Code of Conduct are discussed in greater detail later in this order.

## 2. Comments on RTO West Governance Structure

### a. Membership in Transmission Dependent Utility Class

Several parties contend that utilities selling their assets to TransConnect will have double representation under the proposal. Consumer-Owned Utilities, PPC, PNGC and PGP argue that this proposal will inequitably allocate member voting rights by affording large major transmitting utilities the right to become members of the TDU class when they sell their assets to TransConnect. Utah AMPS argues that the proposal will afford RTO West Applicants the right to select up to eight members of the Trustee Selection Committee, because they would select two members in the TDU class plus the six members in the Transmission Owners class. This, according to Utah AMPS, would enable the RTO West Applicants to block the selection of a proposed candidate or the removal of a sitting trustee. Consumer-Owned Utilities oppose the exception to the definition of Affiliate for utilities proposing to form an ITC, since this would allow the utilities that form TransConnect to participate in the TDU class while their affiliated ITC participates in the Major Transmitting Utility Class.

Consumer-Owned Utilities and PNGC also argue that the bifurcated TDU class voting structure proposed in the filing gives larger utilities disproportionate representation. According to Consumer-Owned Utilities, this change from the consensus proposal violates the independence standard and ignores the regional consensus of one member, one vote. The Consumer-Owned Utilities urge the Commission to reinstate the consensus proposal of one member, one vote, with no subclasses for the TDU class. If the Commission allows load weighting, then Consumer-Owned Utilities recommend that the Commission also require a super-majority voting requirement of 80 percent of the entire TDU class on the load-weighted mechanism. This would avoid allowing two or three of the largest distribution IOUs to dominate the voting. Consumer-Owned Utilities also point out that the one member, one vote, TDU Sub-Class is also flawed because it doesn't allow members with 50 percent or more of the voting power in the load-weighted subclass to vote in the non-load weighted class. Instead, they believe that all TDUs should vote in each Sub-Class, two by load and four based on membership.

Deseret comments that RTO West's proposed Bylaws should not restrict a transmitting utility that contributes its assets to the RTO from participating in an appropriate membership class. Deseret requests that the Bylaws be amended to afford any entity that submits its transmission assets to the RTO's operational control the right, but not the obligation, to join a Participating Transmission Owner class under the RTO West Bylaws. Deseret complains that the threshold for membership in the Major

Transmitting Utilities class (which is defined as including utilities owning transmission assets having a net book value greater than or equal to two percent of the aggregate net book value of the RTO West Transmission System) creates a moving target.

### Response of RTO West Applicants

In response, RTO West Applicants argue that if they are not permitted to have fair representation in the TDU class (if an ITC is formed) they will be deprived of voting rights in the RTO West structure. RTO West Applicants point out that the Commission's independence requirement precludes the companies that form an ITC from having control over the ITC. Therefore, these utilities are not affiliates of the ITC in the traditional sense, and they would not have representation in the Major Transmitting Utility Class. When these utilities divest ownership of their transmission systems, they will become transmission-dependent utilities and should be entitled to participate in the RTO West TDU Class. As noted above, RTO West Applicants contend that they would have no voice in RTO West if they were precluded from participation in the TDU Class. RTO West Applicants do not consider representation by other TDU class members, such as the Consumer-Owned Utilities, to be sufficient to represent their interests. RTO West Applicants note that the bifurcated TDU representation process is a compromise that is intended to deal with the unique situation of the distribution companies that will be left after the formation of TransConnect.

RTO West Applicants also dispute the intervenors' characterization of the proposal as repudiating the collaborative process, since all parts of the proposal were extensively discussed and broad agreement was reached on most governance issues during the collaborative process. While RTO West Applicants acknowledge that the TDU class allocation proposal was not agreed to by all participants, they state that it is a compromise that reflects a reasonable attempt to balance the interests of large and small members of the TDU class.

RTO West Applicants agree to Consumer-Owned Utilities' proposal for all TDU members to vote in each Sub Class. Consequently, they agree to eliminate language in the Bylaws that provides "those Members comprising 50 percent or more of the voting power in the [load-weighted] Member Sub Class . . . shall not be permitted to vote in this Member Sub-Class."

### Commission Response

In Order No. 2000, the Commission required that RTO governance be independent of market participants. This standard requires that the RTO, its employees and non-stakeholder directors have no financial interests in any market participants, and that the RTO must have a decisionmaking process that is independent of control by any market participant or class of participants. RTO West Applicants propose a process for determining the RTO West slate of Trustees that we find will ensure a fair and non-discriminatory selection of Trustees. No single class of owners can exercise control over the selection of the directors so as to threaten independence, and the Trustees Selection Committee, which chooses among Trustee candidates, reflects the diversity among stakeholder groups. Accordingly, we find the RTO West Applicants' governance proposal, as set forth in the RTO West Articles of Incorporation and Bylaws, satisfies the independence standard set forth in Order No. 2000.

As is discussed in more detail below in connection with the proposed TransConnect ownership structure, owners of transmission facilities to be transferred to TransConnect will retain a minimal active ownership in those facilities, for a limited time, and are otherwise limited to passive ownership.<sup>14</sup> The proposed TransConnect ownership structure is within both the safe harbor level for active ownership by individual entities and the benchmark level for active ownership by membership classes set forth in Order No. 2000.<sup>15</sup> Accordingly, we find that these former transmission owners will not have control over day-to-day decisions or policy considerations. In fact, they have very limited voting rights and therefore should not be considered members of the Major Transmitting Utility Class. Furthermore, when transmission owners transfer their assets to TransConnect, which will satisfy the Order No. 2000 safe harbor and benchmark limitations, these entities should not be precluded from participation in the TDU member class. To find otherwise would effectively deny them representation in

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<sup>14</sup>According to the TransConnect Application, no market participant (including members of TransConnect) or any of their affiliates may own, or have the ability to direct the exercise of voting rights of more than 5 percent of the outstanding Class A Common Stock of the Corporation during the five-year period following the date of commencement. In addition, no class of market participants may own, in aggregate, more than 15 percent of the outstanding Class A Common Stock of the Corporation during the five-year period following the date of commencement, without prior Commission approval. No market participant, including members of TransConnect or any of their affiliates, may own any Class C Common Stock, which has full voting rights.

<sup>15</sup>Order No. 2000 at 31,069-70 (2000); Order No. 2000-A at 31,365-67.

RTO West governance. For these reasons, we also agree with the RTO West Applicants that transmission owners that transfer their assets to TransConnect should not be considered affiliates of TransConnect for purposes of class definition.

We also find that the RTO West Applicants' proposal to structure TDU class voting on a bifurcated basis reasonably balances the interests of larger utilities with smaller utilities, by incorporating load weighting while still allowing each utility at least one vote. We decline to require an eighty percent super majority voting requirement as impractical and likely to lead to gridlock in decisionmaking. Consistent with their commitment noted above, we direct RTO West Applicants to eliminate language in the Bylaws that provides "those Members comprising 50 percent or more of the voting power in the [load-weighted] Member Sub Class . . . shall not be permitted to vote in this Member Sub-Class," as agreed to by the RTO West Applicants. RTO West Applicants are directed to include this change in their Phase 2 filing.

b. Participation of Large End Users in Retail Customer Class

Industrial Customers comment that the Bylaws and Governance proposal should be revised to allow adequate participation by large retail customers and regional trade organizations representing the interests of retail customers. They state that the definition of "Retail Customer" should eliminate the reference to "governmental or bona fide public interest organization which demonstrates to the reasonable satisfaction of the Corporation that it is authorized by statute or otherwise to advocate the interests of such retail customers, or any segment thereof, as retail electric customers," since it precludes large retail customers from direct involvement. Industrial Customers also recommend that Article V, § 3(b)(iv) be clarified to provide that if no large retail customers are also scheduling coordinators, then all four seats shall be elected by and held by Large Retail Customers.

The RTO West Applicants point out that the Bylaws already provide for direct participation by large and small end-users. Furthermore, trade organizations may join the Unaligned Entities Class. The RTO West Applicants agree to revise the Bylaws to allow all four Trustees Selection Committee seats allocated to the Large Retail Customers to be retained if there are not Large Retail Customers that are Scheduling Coordinators.

Commission Response

We decline to require revisions to the RTO West Bylaws in response to the request of the Industrial Customers. Large retail customers and trade organizations

representing the interests of retail customers are already entitled to participate in RTO West governance by joining the State and Provincial Energy Authorities and Utility Commissions/Tribal Utility Regulatory Authorities/Unaligned Entities class and these entities also will be represented indirectly by government or public interest organizations in the retail class.

c. Role of the Board Advisory Committee

Consumer-Owned Utilities, Utah AMPs, and PNGC comment that the filing reduces the rights and responsibilities of the Board Advisory Committee in many ways from the consensus proposal, including access to the Board and scope of issues upon which the Board must seek Committee advice. They further contend that regular meetings contemplated by the consensus proposal are eliminated in the current proposal. These intervenors assert that with these features, the RTO Board of Trustees may become isolated from the membership and its concerns. Conversely, Williams and Micron Technology comment that stakeholders should also be on the independent Board of Trustees rather than being limited to the Advisory Committee and that they should have a larger role in governance.

The RTO West Applicants respond that the proposed Bylaws reasonably balance the stakeholders' ability to participate in RTO West policy making with the needs for independence and efficient decisionmaking. The RTO West Applicants also are concerned that the Board of Trustees' flexibility to adopt and adjust procedures related to public process would be hampered if procedures are locked into the Bylaws.

Commission Response

We decline to require stakeholder membership on the Board of Trustees. In Order No. 2000, the Commission declined to impose specific governance requirements for RTO boards, but provided guidance regarding non-stakeholder board proposals based on our experience with Independent System Operators.<sup>16</sup> The Board Advisory Committee affords stakeholders an opportunity to bring to the attention of the Board of Trustees any issue of importance to stakeholders. Notably, participation in the Board Advisory Committee is not limited, and any RTO West member may join. Furthermore, the proposal allows for dissenting views to be presented to the Board of Trustees. We believe these provisions afford ample opportunity for stakeholders to participate, within an independent governance structure.

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<sup>16</sup>Order No. 2000 at 31,074.

d. RTO West Board of Trustees Qualification Criteria

The RTO West Bylaws provide that at least two thirds of the Board of Trustees Candidates must have substantial experience as a member of the board of directors or as a chief executive officer, president, chief operating officer, or other similar positions of at least one publicly or privately held corporation or major regional or national not-for-profit entity, with revenues or an annual operating budget equal to five percent of the gross book value of the assets to be operated by RTO West. Candidates to the Board of Trustees may not include an owner, director, officer, employee, partner, principal, or similar individual of a market participant, RTO West member, or scheduling coordinator.

Comments

A number of intervenors, including PPC, Consumer-Owned Utilities, PNGC, Utah AMPS, and PGP, contend that the requirement that two-thirds of the candidates for the Board of Trustees must have held positions of significant responsibility with organizations with revenues or an operating budget of at least five percent of the gross book value of the RTO's assets will stack the Board of Trustees with members that favor large utilities resembling the RTO West Applicants. Consumer-Owned Utilities, PNGC and PGP recommend a revision that would also allow candidates to be selected from organizations whose assets have a gross book value equal to five percent of the gross book value of the RTO's assets.

RTO West Applicants counter that the qualification criteria extend not only to publicly traded for-profit corporations, but to privately held, or not-for-profit corporations and government entities as well. RTO West Applicants believe that the criteria will ensure that most Trustees have experience managing problems of business enterprises of a similar size to RTO West. Furthermore, one-third of the candidates need not come from larger entities.

Commission Response

With respect to Trustee qualification criteria, we will not require any changes to the RTO West Bylaws. While the qualification criteria require that a majority of Trustees will have the necessary experience managing a large corporation or institution, there also are ample opportunities for Trustees with experience at smaller companies. These qualification requirements provide adequate guidance regarding expertise, experience and background criteria to be applied by the search firm in determining Trustee candidates. We find that these criteria neither unduly restrict the type of Trustee that can

be selected nor do they undermine independence. Accordingly, we will accept the selection criteria as proposed.

e. Financial Interests in Market Participants and Code of Conduct

Description of RTO West Proposal

As a not-for-profit, public benefit corporation, RTO West would have no financial interest in any market participant. The RTO West Bylaws contain a Code of Conduct for RTO West officers, employees, full-time consultants and contractors.<sup>17</sup> Under the Employee Code of Conduct, all employees must apply the terms and conditions of the RTO West Tariff, including requests for service, on a non-discriminatory basis. In addition, if any provision of the RTO West Tariff requires the exercise of discretion, employees must apply the tariff provision in the same manner to the same or similarly situated persons. To the extent a tariff provision does not require the exercise of discretion, the Code of Conduct requires that all employees strictly enforce that provision of the RTO West Tariff. RTO West employees are prohibited from buying or selling energy for others or acting as an energy broker.

Employees and their immediate family members are prohibited from owning securities of any Market Participant. Employees who hold a financial interest in a Market Participant must divest of any financial interest in any market participant within six months of their initial election, appointment, or hire. However, ownership of such securities will be permitted under certain limited circumstances, e.g., through diversified mutual funds (other than those funds concentrating their investments in the electric utility industry or any segment thereof).

An individual may also continue his or her pre-existing participation in a qualified defined benefits pension plan and a health benefits plan of a Market Participant, so long as the benefits to the individual do not vary with the economic performance of the Market Participant or the value of any of the Market Participants' securities held by the plan.

Similarly, the bylaws contain a separate Code of Conduct for the Trustees of the corporation.<sup>18</sup> The Trustees' Code of Conduct also prohibits Trustees or related persons from having a financial interest in any Market Participant. Trustees who hold a financial

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<sup>17</sup>RTO West Application, Attachment J, Exh. A.

<sup>18</sup>RTO West Application, Attachment J, Exh. B.

interest in a Market Participant must divest of any financial interest in any market participant within six months of the Trustee's election. However, ownership of securities will be permitted under certain limited circumstances, e.g., through diversified mutual funds (other than those funds concentrating their investments in the electric utility industry or any segment thereof).

### Comments

PPC argues that the proposal to allow a Trustee to hold a financial interest in a Market Participant for six months following election to the Board of Trustees (or indefinitely with Commission permission), violates the independence requirement and should be rejected. Consumer-Owned Utilities also claim that the definitions of "Market Entity" "Market Participant," and "Member" are flawed and will allow Trustees to hold a financial interest in a significant subset of entities that may in fact have a substantial interest in the operation of the RTO.<sup>19</sup> Consumer-Owned Utilities also believe that the Trustee Code of Conduct should preclude Trustees from having financial involvement in entities that have substantial dealings with the RTO that do not involve the power market.

Consumer-Owned Utilities also object to loopholes in the Employee Code of Conduct that result from the definition of "Market Participant" that leaves out entities such as power schedulers or distribution utilities that are involved with or served by RTO West. Furthermore, Consumer-Owned Utilities believe that the Employee Code of Conduct should prohibit post-employment transactions that would conflict with employees' former RTO West responsibilities.

### Response by RTO West Applicants

RTO West Applicants state that the proposed Bylaws for RTO West are more strict than the Commission requirements because "they limit financial interests by both Market Participants and other categories" where perceived conflicts might arise. Furthermore, they note that the Audit Committee of the Board of Trustees will serve to ensure the independence of both employees and Trustees. Therefore, RTO West Applicants believe that the proposed restrictions balance the need to protect against

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<sup>19</sup>According to Consumer-Owned Utilities, these include entities that are eligible to become members but do not choose to join and who do not qualify as "Market Participants."

inappropriate conflicts of interest with the need to avoid undue restrictions on the pool from which candidates for the Board of Trustees may be selected.

### Commission Response

The Commission rejects PPC's argument opposing the provision which allows corporate personnel to hold stock in market participants for up to six months. The provisions RTO West has proposed concerning financial interests in market participants and the Code of Conduct generally track those accepted by the Commission in GridFlorida and are hereby accepted.<sup>20</sup> The Commission declines to require the clarifications of the Code of Conduct requested by PGP and PPC.

The Commission also disagrees with the Consumer-Owned Utilities' claim that the definitions of "Market Entity," "Market Participant," and "Member" may allow Trustees to engage in financial dealings with entities that have a financial interest in RTO West. RTO West's proposed Code of Conduct definition of market participant has the same meaning as set forth in Order No. 2000. In addition, RTO West's definition of market entity goes even further in limiting Trustees financial dealings by restricting financial dealings not only with market participants, but also with members of the Corporation, including any affiliate of a market participant or corporate member of the affiliate. Furthermore, RTO West's Code of Conduct generally tracks the Commission's decision in Alliance<sup>21</sup> and is here accepted. Therefore, we do not believe that further changes to these definitions are warranted.

#### f. Other Bylaw Provisions

##### (1) Membership Fee and Burdens to Participation

### Comments

PGP, Utah AMPS, and Public Interest Organizations, argue that the Bylaws should be revised to reduce the \$1,000 annual membership fee, because it is too high for

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<sup>20</sup>GridFlorida LLC, et al., 94 FERC ¶ 61,020 at 61,047-49 (2001) (GridFlorida) citing Midwest Independent Transmission System Operator, Inc., et al., 84 FERC ¶ 61,231 at 62,148 (1998)(Midwest ISO I) and Midwest Independent Transmission System Operator, Inc., et al., 85 FERC ¶ 61,250 at 62,036 (1998) (Midwest ISO II).

<sup>21</sup>Alliance Companies, et al., 91 FERC ¶ 61,152 at 61,572 (2000) (Alliance), reh'g pending.

small utilities and organizations. They suggest reducing the fee to \$200-\$300 or favor a provision that authorizes the RTO West Board to waive the membership fee for bona fide public interest organizations. In addition, the Oregon Office of Energy recommends that the quorum requirement for the annual meeting be eliminated, because it may be difficult for small members to send a representative. Public Interest Organizations also comment that the Bylaws quorum requirement should be revised to eliminate the ability of one class of RTO member to prevent meetings.

The RTO West Applicants believe that the \$1,000 membership fee is appropriate, reasonable and fair. However, they are willing to revise the Bylaws to include authority for the Board of Trustees to reduce or waive fees for legitimate public interest participants upon the written request of such entities.

#### Commission Response

We believe that the membership fees are appropriate for the vast majority of participants. We agree with the RTO West Applicants that the most appropriate means to ensure that all potential members may join is to provide for fee waivers or reductions on a non-discriminatory case-by-case basis. Therefore, we accept RTO West Applicants' proposal to amend the proposed Bylaws to authorize the Board of Trustees to waive or reduce the fees on a non-discriminatory basis for legitimate public interest participants upon the written request of such entities. We direct RTO West Applicants to include an appropriate revision in their Stage 2 filing.

We do not believe that the quorum requirement for the annual meeting is unreasonable. It is generally accepted that a quorum is necessary for formal meetings to ensure that decisionmaking is not conducted by a small fraction of participants.

- (2) Addition of Market Monitoring Unit Provisions and Statement of Public Purpose to the RTO West Bylaws

#### Comments

The Oregon Office of Energy and the State of Washington, Office of Trade and Economic Development, Energy Division recommend that the RTO West Bylaws be revised to include the director of the market monitoring unit as an officer appointed directly by the Board of Trustees and to allow access by the states and the Commission to confidential RTO data. Public Interest Organizations recommend that the Bylaws should be revised to add market monitoring to the Bylaws. Morgan Stanley comments that RTO

West fails to address the specific market monitoring functions it will perform. The State of Washington, Office of Trade and Economic Development, Energy Division notes that there is not an agreed-upon role for the manager of the market monitoring unit and that the institutional framework agreed upon by the participants is absent from the documents filed.

Oregon Office of Energy and Public Interest Organizations recommend that the RTO West Bylaws be revised to state a more specific purpose. Affiliated Tribes of Northwest Indians recommend that a requirement be added that RTO West must act in the financial interest of the public and in a manner that protects the natural environment of the region. The State of Washington, Office of Trade and Economic Development, Energy Division also believe that the Bylaws lack an adequate mission or purpose statement.

RTO West Applicants agree that the reports of the Market Monitoring Unit should be made to the Board of Trustees and that the head of the Market Monitoring Unit should have unimpeded access to the Board of Trustees. However, they do not agree to the proposed Bylaws changes, because these would deprive the Board of Trustees' of the discretion to determine the day-to-day reporting relationships with the head of the Market Monitoring Unit. RTO West Applicants believe that the stated purpose to meet the Commission's applicable requirements is sufficient.

#### Commission Response

We agree with the parties that appropriate market monitoring criteria and staff are important to a well functioning market. However, these provisions need not be incorporated into the RTO West Bylaws. RTO West has not yet provided all of the details of its market monitoring plan. Accordingly, we will defer consideration of RTO West's market monitoring plan until such time as it is filed. The Commission will address any issues raised by parties at that time.

### **B. TransConnect Governance Proposal**

#### Description of the Proposal

TransConnect Applicants propose to create a for-profit independent transmission company, TransConnect LLC (TransConnect), which will own and operate the interstate transmission assets presently owned by each of the TransConnect Applicants. TransConnect Applicants represent that TransConnect will, in turn, participate in RTO

West as a single transmission owner by transferring operational control of these assets to RTO West.

TransConnect Applicants will establish TransConnect by forming two companies, TransConnect and TransConnect Corporate Manager (Corporate Manager). TransConnect will be a Delaware limited liability company which will consist of members who have contributed their interstate transmission assets in exchange for an ownership interest in TransConnect.<sup>22</sup> The Corporate Manager will serve as the managing member of TransConnect and will have control over its policy and procedures. The Corporate Manager is authorized to issue three classes of common stock and one or more classes or series of preferred stock. At formation, the Corporate Manager will be the sole holder of Class A Common stock, for which holders will have full voting rights. Class A Common Stock will be issued through a subscription agreement, an initial public offering, or through private placement.

TransConnect Applicants who want to transfer their ownership interest into stock will receive Class B Common stock, for which holders will have limited voting rights.<sup>23</sup> Those members who become non-market participants may convert their limited voting interests to Class C Common stock, which has full voting rights.

#### 1. Board Selection Process

TransConnect Applicants state that the Corporate Manager will be governed by an independent Board of Directors, consisting of eight members and a Chief Executive Officer. A Board Selection Committee (Selection Committee) comprised of representatives from five stakeholder classes<sup>24</sup> shall select the Board of Directors from a

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<sup>22</sup>Other than the Corporate Manager, each Member will receive an interest in TransConnect in proportion to the value of each Member's transmission system to the aggregate value of the transmission systems of all Members. (TransConnect Application, Transmittal Letter at 9.)

<sup>23</sup>Those limited voting rights are discussed in section B.2 below.

<sup>24</sup>The Board Selection Committee shall consist of six representatives selected by the five stakeholder classes of RTO West with each representative having one vote on all matters to be decided by the Committee. This committee will include two representatives from the Major Transmitting Utilities Class, one representative from the Non-utility Entities Class, one representative from the Retail Customers Class, one representative

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slate of fifteen candidates prepared by an independent executive search firm. According to the application, at least six of the initial directors shall be, or have held the position of president, chief executive officer, chief operating officer, chief financial officer or director of at least one publicly-traded corporation.<sup>25</sup> Upon receipt of the slate of candidates, the Selection Committee shall select by affirmative vote of 2/3, eight candidates as to serve as initial directors.<sup>26</sup> In addition, the Selection Committee shall choose an auditing firm to serve as the independent compliance auditor (Compliance Auditor) of the Corporate Manager and TransConnect.<sup>27</sup>

Upon election to the Board of Directors, each director shall execute a Subscription Agreement and a Voting Trust Agreement which will remain in effect until the consummation of an initial public offering by the Corporate Manager, or the sale of shares of Class A Common Stock to private purchasers. Under the Subscription Agreement, each Director will purchase 100 shares of Class A Common stock, upon

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<sup>24</sup>(...continued)

from the State and Provincial Energy Authorities Class, and one representative from the Transmission Dependent Utilities Class. The Major Transmitting Utilities Class includes the TransConnect Applicants. TransConnect Applicants are precluded from inclusion in any other class. (TransConnect Application, TransConnect Formation Plan, Exh. B at 2-4.)

<sup>25</sup>The application states that those persons selected must engender credibility in the marketplace and maximize the value of an initial public offering. To this end, the search firm is required to select and consult with a nationally recognized investment banking firm concerning the qualifications of directors. (TransConnect Application, TransConnect Formation Plan, Exh. B at 9.)

<sup>26</sup>Upon election, the eight directors shall meet and choose an individual to serve as the initial CEO/Chairman who will also serve on the Board of Directors.

<sup>27</sup>According to the application, the compliance auditor must be one of the ten largest accounting firms in the United States and cannot be affiliated with the Corporate Manager, TransConnect or any utility member of TransConnect LLC, any holder of shares of Class B Common Stock or Class C Common Stock of the Corporate Manager or any market participant. (TransConnect Application, TransConnect Formation Plan, Exh. B at 12.)

incorporation of TransConnect.<sup>28</sup> The Directors will subsequently transfer such shares to a voting trust so that the shares of Class A Common Stock can be voted as a unit by the Board of Directors.<sup>29</sup> The Board will be divided into classes to allow directors to serve staggered three-year terms, with the term of a class expiring at each annual meeting of stockholders.<sup>30</sup> With the exception of filling vacancies on the Board of Directors,<sup>31</sup> subsequent directors will be elected by a plurality of the votes cast by the Class A Common Stockholders and Class C Common Stockholders.

### Comments

PPC argues that the proposed voting structure for choosing board members is biased towards those utilities forming TransConnect and may not result in a board that is sufficiently independent. Because there is unequal representation on the Selection Committee, PPC asserts that TransConnect Applicants can block the selection of a candidate if they can get a single vote from one of the other four classes, whereas the other four classes can elect a board member only if they cast their votes unanimously. According to PPC, TransConnect Applicants' representation on the Selection Committee should be limited to single representative on a five-member Selection Committee, and the initial board of directors should be elected by a simple majority. In addition, PPC argues that the initial board composition, which requires six of the of the nine initial directors to be or have been president, chief executive officer, chief operating officer or director of at least one publicly traded corporation, is arbitrary and may preclude consideration of many desirable board candidates from consumer-owned or federal utilities.

TransConnect Applicants state that despite having two representatives on the Selection Committee, it cannot control the Selection Committee process, nor can they veto a candidate without obtaining agreement from at least one other committee member.

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<sup>28</sup>According to the Subscription Agreement, the price per share will be \$10.

<sup>29</sup>The Voting Trust Agreement stipulates that shares of Class A Common Stock held by the Voting Trust will be cast in accordance with the decision of the majority of the Directors, with each Director entitled to one vote.

<sup>30</sup>Until such time as the initial public offering the Board of Directors will be self-perpetuating. (TransConnect Application, Voting Trust Agreement, Exh. G, Section 5(c)).

<sup>31</sup>Those vacancies arising through death, resignation, and removal will be filled by a majority of directors in office. (TransConnect Application, Bylaws, Exh. E at 8-9).

With four votes required to install a board member, the representatives of at least three out of the five classes need to agree on any given selection. TransConnect Applicants argue that the six member Selection Committee is reasonable and should be approved. In addition, TransConnect Applicants disagree that the specified qualifications are arbitrary, rather, they state the purpose for the specific board member qualifications is to ensure a highly qualified board with experience running a for-profit corporation.

#### Commission Response

We disagree that the board qualifications set forth are arbitrary. As TransConnect Applicants point out, the requirement calls for a candidate to hold such a position in at least one publicly traded company, currently, or at some point previously, in the candidate's career. We do not believe that this is overly restrictive since (1) the candidate is not required to currently hold such position and (2) candidates with other experience can be considered since three of the initial board positions do not have the restriction. We also believe that the Selection Committee process requires no modification. Although TransConnect Applicants have two votes on the Selection Committee, they cannot unilaterally veto a candidate, without an additional vote from another committee member. Moreover, since the candidate search is conducted by an independent search firm, and its search is based on specific qualification criteria, we conclude that the process is reasonable.

## 2. Independence

### TransConnect Proposal

#### a. Active Ownership Interests and Passive Ownership Interests

According to the application, consistent with Order No. 2000 safe harbor and benchmark limitations, no market participant, including members of TransConnect or any of their affiliates may own, or have the ability to direct the exercise of voting rights more than five percent of the outstanding Class A Common Stock of the Corporation during the five-year period following the date of commencement. In addition, no class of market participants may own, in aggregate, more than 15 percent of the outstanding Class A Common Stock of the Corporation during the five year period following the date of commencement, without prior Commission approval.

Under the proposal, TransConnect Applicants may exchange their membership interest in TransConnect into Class B Common Stock.<sup>32</sup> Those holding Class B Common Stock are not entitled to propose any matter for stockholder approval, nor are they entitled to vote on any matter presented for a vote of the stockholders of the Corporation, including the directors of the Corporation. TransConnect Applicants may also exchange all or a portion of their interest in TransConnect into Class C Common Stock if a member becomes a "non-market participant." Those holding Class C Common Stock have full voting rights held by Class A Common Stockholders.<sup>33</sup> According to the application, no restricted person<sup>34</sup> may own any Class C Common Stock of the Corporation.

b. TransConnect Member Retained Rights

The TransConnect Members will comprise a Membership Committee that will meet only when called by the Corporate Manager or by Members holding at least 70 percent of the total outstanding interests in TransConnect. Meetings shall be solely for the purpose of seeking the approval or consent of the Members on limited matters as follows:

- (1) any proposal to: (a) convert the Company into an entity other than a LLC, (b) enter into any transaction that would result in a change of control of the company, (c) dispose of all, or substantially all of the assets of the Company (d) merge or consolidate with any other entity or (e) take any action that would preclude a Member from using the equity method of accounting for its investment in the Company;
- (2) any acquisition or business development opportunity that is not directly or indirectly related to the provision of electric transmission service;
- (3) any proposal related to bankruptcy, insolvency, or reorganization; or

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<sup>32</sup>TransConnect Application, Certificate of Incorporation, Exh. D at 5.

<sup>33</sup>Id. at 5-6.

<sup>34</sup>A restricted person is defined to include any market participant, including any member of TransConnect, or any of their affiliates. See TransConnect Application, Certificate of Incorporation, Exh. D at 3.

(4) any proposal to amend the Approval Terms or the Economic Terms of the Operating Agreement.

In addition, Members have the right to vote on any proposal to issue more than twenty percent of any outstanding class or series of securities of the Corporate Manager or any proposal to issue more than ten percent of any outstanding class or series of securities to one or more affiliates of the Corporate Manager, Inc., unless issuances are offered on the same terms to all stockholders .

c. Fiduciary Obligations

According to the application, the directors of the Corporate Manager shall consider the interests of the stockholders solely in their capacity as investors in the Corporation but shall have no duty to consider, and shall not consider, any other interests that the stockholders of the Corporation may have in any other business, including any interest such stockholders may have as participants in the electric markets served by the Corporation.

d. Compliance Auditor

The Compliance Auditor shall conduct an initial audit of the passive ownership arrangements of the Corporate Manager within two years of the effective date of operations and every three years thereafter. The Compliance Auditor may report any findings and recommendations to the Commission without prior approval of the Corporate Manager. In addition, the Compliance Auditor will review an annual compliance affidavit filed by each Director of the Corporate Manager and report its findings to an Audit Committee of the Board of Directors.<sup>35</sup>

e. Code of Conduct

TransConnect Applicants filed a detailed Code of Conduct which, among other things prohibits directors and officers and members of their immediate families from holding any financial interests in any market participant, prohibits the disclosure of any confidential information, and codifies conflict of interest requirements.

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<sup>35</sup>TransConnect Application, Bylaws, Exh. E at 16.

### Comments

Utah AMPS, Dynegy, Inc, and Electric Power Supply state that active ownership interests by individual market participants, including TransConnect Applicants, raises questions of independence of TransConnect from market participants.

Utah AMPS argues that some of the TransConnect Applicants, presumably Sierra Pacific, Nevada Power, Montana Power and any other utility that divests its generation assets, may control TransConnect through its control of Class C Common stock despite the fact that Class C Common stock prohibits ownership by market participants. According to Utah AMPS, Order No. 2000 requires that a transmission organization be independent of individual participating transmission owners, as well as sellers of electric power. The Commission further recognized that the involvement of pure transmission companies in RTO decisionmaking processes could be problematic and could be relevant to the independence criterion. In addition, Utah AMPS argues that these entities despite their generation divestitures are market participants because they are still engaged in the sale of electric energy at wholesale and/or retail, and as providers of last resort.<sup>36</sup> Furthermore, Utah AMPS argues that the utilities do not provide details such as the actual ratio of Class C Common Stock to Class A Common Stock nor the conversion formula which will determine how many shares of Class C common Stock its "non-market participant" members will be entitled to vote. According to Utah AMPS, there is nothing to prevent the Class C shares, when combined with the Class A shares held by TransConnect members, from grossly exceeding the Commission's 15 percent benchmark limitation on the number of voting shares that may be held by any class of participants.

### TransConnect Applicants' Response

TransConnect Applicants state that Class C Common Stock is reserved for those members who become non-market participants by divesting certain aspects of their business, e.g., becoming a distribution service only company. According to TransConnect, conversion of the membership interest into Class C Common Stock allows the non-market participant to retain the tax benefits of membership in TransConnect while permitting active participation in corporate matters to the same extent, as other non-market participants.

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<sup>36</sup>Utah AMPS Protest at 7-8.

### Commission Response

In Order No. 2000, we established a safe harbor for active ownership interests by market participants, and concluded that ownership of up to five percent of an RTO's outstanding voting securities would not provide such owner with control. In addition, we adopted a benchmark of 15 percent class ownership. Because the proposal for active ownership set forth by TransConnect Applicants is within our established safe harbor and benchmark provisions, we will accept these provisions, as proposed. Intervenors have not raised any substantive concerns that would require us to reconsider our decision regarding these provisions.

Contrary to Utah AMPS's assertions, under the terms of the agreement that will create TransConnect, TransConnect members can not "redeem, purchase, acquire, convert or take any other action which will increase above 5% the percentage of Voting Interests of the Company owned, held or controlled by any one Market Participant and its Affiliates, or increase above 15% the percentage of outstanding Voting Interests, owned, held or controlled by all Market Participants and their affiliates."<sup>37</sup> As a result, the provisions for active ownership interests established in Order No. 2000 will not be exceeded.

Utah AMPS also suggests that despite generation divestiture, Sierra Power, Nevada Power and Montana Power would be market participants as "providers of last resort." In Order No. 2000, the Commission noted that, although "providers of last resort" are included in the market participant definition because they are sellers of electric energy, "their responsibilities and incentives may vary widely."<sup>38</sup> The Commission indicated further that:<sup>39</sup>

[C]ertain factors (e.g., an entity's sole electric sales are made to satisfy a state requirement and it does not compete for retail load) would support a finding that the entity is not a market participant.

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<sup>37</sup>TransConnect Application, Exh. C, Limited Liability Company Operating Agreement at 13.

<sup>38</sup>Order No. 2000 at 31,063, reh. denied, Order No. 2000-A at 31,363.

<sup>39</sup>Id.

Consistent with our finding in Order No. 2000, as reaffirmed in Order No. 2000-A, we will allow an entity desiring to acquire TransConnect Class C common stock that becomes a provider of last resort to seek a determination from the Commission that, based on the circumstances of its service obligation, it should not be considered to be a market participant.

We find, however, that TransConnect Applicants' prohibition of Class C common stock ownership requires clarification. According to the TransConnect Application, no market participant may own Class C Common Stock. In fact, the Certificate of Incorporation specifically states that "no Restricted Person may Own any Class C Common Stock of the Corporation."<sup>40</sup> A Restricted Person is defined as any Market Participant (including any Member<sup>41</sup> of TransConnect), or any affiliate of a Market Participant.<sup>42</sup> However, TransConnect Applicants represent that Class C Common Stock is reserved for those TransConnect members who become non-market participants. Thus, the definition of persons ineligible to purchase Class C Common Stock conflicts with TransConnect's intention regarding that stock. TransConnect Applicants are directed to clarify these statements in their Stage 2 filing.

Furthermore, consistent with the continuing obligation of applicants under Order No. 2000 to inform the Commission of any changed circumstances regarding ownership,<sup>43</sup> to ensure that TransConnect members that elect to convert their ownership interest to Class C Common stock (*i.e.*, voting securities) are non-market participants, we will direct those entities, 30 days prior to such election,<sup>44</sup> to provide notification to the

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<sup>40</sup>TransConnect Application, Exh. D, Certificate of Incorporation at 6. See also Exh. E, Corporate Manager Bylaws at 43.

<sup>41</sup>Members comprise those utilities who contribute assets to TransConnect and the Corporate Manager.

<sup>42</sup>TransConnect Application, Exh. D, Certificate of Incorporation at 3.

<sup>43</sup>Order No. 2000 at 31,067, 31,072.

<sup>44</sup>Under the Certificate of Incorporation, rights of conversion shall be exercised by giving written notice to the Corporation at least 10 days prior to the Conversion date. In addition, the Corporation may require as condition to any conversion to Class A Common Stock or Class C Common Stock, satisfactory evidence that the proposed conversion will not violate restrictions on ownership. (See TransConnect Application,

(continued...)

Commission of such conversion. The notification must include satisfactory evidence that such entity is no longer a market participant as defined by the Commission in Order No. 2000 or subsequent orders.

As is explained in Order No. 2000, the purpose of the Compliance Audit is to ensure that passive ownership arrangements remain passive over time and to provide assurances to other market participants that the RTO is truly independent. Under TransConnect Applicants' proposal, the Compliance Auditor will review the passive ownership arrangements of TransConnect and the Corporate Manager. The Compliance Auditor also will review annual affidavits submitted by the directors, officers and employees of the Corporate Manager and the officers and employees of TransConnect to ensure compliance with the limitations on stock ownership and the independence requirements. We clarify that the audit conducted by the Compliance Auditor should also examine the Corporate Manager's decisionmaking process, including its operational and investment decisions, to ensure that passive owners have not "retained rights or privileges . . . that would put non-owner participants at a competitive disadvantage."<sup>45</sup> We also clarify that, while the Application states that, "[t]he auditor has the right to report any findings and recommendations to FERC without Corporation approval," the audit report should be filed with the Commission, in a public document without Corporation approval, within sixty days after completion of the audit.<sup>46</sup>

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<sup>44</sup>(...continued)

Exh. D, Certificate of Incorporation at 9.) However under the terms of the Limited Liability Operating Agreement, any Member that is not a Market Participant may convert any or all of the Non-voting interest to the same number of voting interests upon written notice to the Company and the Company shall not issue the converted interest until the expiration of a 30 day deferral period. (See TransConnect Application, Limited Liability Operating Agreement at 12-13.)

<sup>45</sup>Order No. 2000 at 31,067.

<sup>46</sup>The Compliance Auditor, however, may request waiver of the time requirement to file its audit report. In addition, consistent with the TransConnect Formation Plan, the Compliance Auditor may request confidential treatment of any reports to the extent they include or are based on confidential corporate or personal information or data.

### C. Section 205 Filing Rights

Sections 13 and 14 of the proposed Transmission Operating Agreement establish the principles under which RTO West would administer its tariff. Two rate periods would be established. During the proposed Company Rate Period,<sup>47</sup> each transmission owner would retain its rights to file rate schedules for use of the transmission facilities. Each participating transmission owner that is a public utility would file rates under section 205 of the FPA and would establish its costs and billing determinants. Participating Transmission Owners whose transmission rates are not subject to Commission or Canadian jurisdiction would submit to RTO West their respective Company Rate charges. Under the proposal, the RTO West Tariff shall specify that the Company Rates are to be billed by RTO West as a billing agent for the Participating Transmission Owner and that all applicable bills shall provide for payment of the Company Rate portion directly to a payment agent designated by the Participating Transmission Owner. Furthermore, during the Company Rate Period, RTO West shall compensate the Participating Transmission Owner for its lost revenues related to pre-RTO levels of short-term firm and non-firm wheeling that cannot be recovered through transfer charges.

After the Company Rate Period, Participating Transmission Owners that are public utilities would continue to file under section 205 of the FPA to recover their revenue requirements and RTO West would set the rates to recover revenues adequate to recover each Participating Transmission Owner's annual revenue requirement<sup>48</sup> However, if the Commission determines that a Participating Transmission Owner is independent from control of market participants or is otherwise entitled to do so, the Participating Transmission Owner would have the right to unilaterally file with the Commission for performance-based rates and other incentive-oriented rate recovery mechanisms.<sup>49</sup> RTO West will conform its tariffs and practices as necessary to ensure collection of rates under such rate recovery mechanisms accepted by the Commission for each Participating Transmission Owner. The Participating Transmission Owners will

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<sup>47</sup>As defined in the Transmission Operating Agreement, the Company Rate Period would commence on the Transmission Service Commencement Date and extend through December 14, 2011. See RTO West December 1, 2000 filing, Transmission Operating Agreement, Attachment A, Exh. A at 3.

<sup>48</sup>See RTO West December 1, 2000 Filing, Transmission Operating Agreement, Section 14.

<sup>49</sup>*Id.* at Section 13.3.

reserve the right to file rate schedules with the Commission for the recovery of stranded costs and to collect such costs with respect to wholesale and retail loads with access to the Participating Transmission Owners' transmission facilities.<sup>50</sup> In addition, the RTO West Tariff shall contain an automatic adjustment clause or other provision that provides for recovery of such Stranded Costs as a surcharge for transmission service to such loads.

TransConnect Applicants propose that TransConnect would file its own rate schedules within the RTO tariff. TransConnect would coordinate with RTO West to ensure its rate schedules are compatible with and will conform to the RTO West requirements for tariff administration.<sup>51</sup> TransConnect Applicants state that their transmission rate proposal will include various innovative rate treatments designed to provide appropriate incentives for TransConnect to act as an efficient owner and developer of interstate transmission. Such rates would be collected by the RTO West Payment Agent in a manner consistent with other RTO West transmission owners.

Consistent with the RTO West proposal, TransConnect would utilize license plate rates for its system and each system currently owned by the TransConnect Applicants will be a separate zone.<sup>52</sup> According to TransConnect Applicants, this would ensure that transmission customers will be able to seamlessly transact through RTO West and will be able to "one stop shop" for transmission service through the RTO West grid. According to the proposal, TransConnect may also make future filings to alter its rates within its individual zones. TransConnect will, to the extent necessary, seek Commission authorization to include its rates in those proposed by RTO West.

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<sup>50</sup> Any load will be deemed to access such facilities if and to the extent (1) the point(s) of interconnection of such load with the RTO West Transmission System are or were with such transmission facilities; or (2) such load is not directly connected to the transmission facilities but would have had insufficient transmission interconnections with transmission providers other than the Participating Transmission Owner to receive the power being wheeled to such load.

<sup>51</sup> TransConnect Application, Transmittal Letter at 25.

<sup>52</sup> TransConnect intends to file performance based and innovative rate treatments in its Stage 2 filing.

### Comments

Utah AMPS argues that TransConnect may not file its own rate tariffs because it is not an RTO, and for this reason, it is not entitled to develop or establish its own innovative rate mechanisms.

### TransConnect Applicants' Response

TransConnect Applicants state that in Order No. 2000, the Commission specifically recognized that hybrid or "tiered structures" would be considered, subject to the RTO being responsible for ensuring the requirements are met in a way that satisfies Order No. 2000. The Commission also noted that innovative pricing proposals would not be incompatible with any particular RTO structure, including tiered organizational structures. TransConnect reiterates that its proposed rate treatment is designed to operate within the RTO West framework.

### Commission Response

Order No. 2000 requires that the RTO have independent and exclusive authority to make section 205 filings that apply to the rates, terms and conditions of transmission service provided over the facilities the RTO operates. Order No. 2000 balances the need to ensure independence in the administration of the regional transmission tariff by the RTO and the need to provide transmission owners the opportunity to recover revenues as owners of the assets. Order No. 2000 explains:<sup>53</sup>

The transmission owners may make Section 205 filings to establish the payments that the RTO will make to the transmission owners for the use of the transmission facilities that are under the control of the RTO; the RTO, in turn, will make Section 205 filings to recover from transmission customers the cost of the payments it makes to transmission owners as well as its own costs and propose any other changes in the rates, terms and conditions of service to transmission customers.

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<sup>53</sup>Order No. 2000 at 31,076; reh'g denied, Order No. 2000-A at 31,369-72. This aspect of Order No. 2000 is on appeal.

As noted by TransConnect, the Commission has recognized that parties may choose to organize under hybrid or tiered structures.<sup>54</sup> Such is the case here, where TransConnect proposes to operate as an independent transmission company within the RTO West structure. We believe it is appropriate to allow TransConnect, as an organization that is independent of market participants, the flexibility to propose mechanisms that will provide incentives for the TransConnect members to take actions within their control to improve grid operation. Order No. 2000 requires that RTO West, as the sole administrator of the tariff for the entire region, must have the exclusive authority to file the rates for service under that tariff. However, Order No. 2000 also specifically permits transmission owners to make FPA section 205 filings with the Commission to establish the payments that the RTO will make to the transmission owners for their transmission facilities. These rights are particularly important where an RTO adopts a hybrid business structure. The Commission reaffirmed in Order No. 2000-A that:<sup>55</sup>

[W]hen activities that contribute to performance are shared between the RTO and the transmission owners, the RTO design may ensure that the rewards and penalties associated with activities performed by transmission owners flow through to achieve the desired result. [footnote omitted]

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<sup>54</sup>See Commonwealth Edison Company, et al., 90 FERC ¶ 61,192 at 61,617-18 (2000) (Commonwealth), where the Commission stated:

The overarching objective of [Order No. 2000] is a single, coordinated and transparent bulk power market in each region, irrespective of the number of transmission entities that support that market. . . Among other things, any such proposal must provide clarity about the decisional process within the RTO, accountability among the entities that constitute such an RTO, and how the binary-RTO will provide customers with "one-stop-shopping."

See also, Order No. 2000 at 30,994 and 31,036-37.

<sup>55</sup>Order No. 2000-A at 31,372.

In Commonwealth, we said that the division of functions in a hybrid RTO must provide "efficiently priced transmission service."<sup>56</sup> Where, as in this hybrid RTO, a participating transmission owner is independent of market participants, we believe that it has the ability to include in its "revenue requirement" filing, a request for performance-based rates and other incentive-oriented rate recovery mechanisms.<sup>57</sup>

We believe that it is appropriate to allow a transmission entity that is independent of market participants to include a request for innovative rate treatments under Order No. 2000 in its section 205 revenue requirement filing because an independent entity will not have an incentive to submit a proposal that would discriminate among particular market participants.<sup>58</sup> While independence from market participants removes the incentive to propose a rate treatment that discriminates among market participants, it does not remove the incentive to potentially favor wires over non-wires solutions in either planning or operations, as we observe in the planning section of this order. The Commission will evaluate the potential for such bias when we review the specific proposals presented in the section 205 filings. We recognize, however, that certain pricing proposals may be more compatible with one form of independent transmission entity than another. We will evaluate each proposal on a case-by-case basis to ensure it will operate appropriately in the particular RTO circumstances.<sup>59</sup>

TransConnect commits to coordinate with RTO West in making its filings to ensure that its proposals are consistent with the overall RTO West rate structure.<sup>60</sup> We require TransConnect to consult with RTO West whenever possible regarding proposals to implement incentive mechanisms to avoid conflicts with the RTO West Tariff rate design. However, in situations where incentive proposals conflict with established RTO

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<sup>56</sup>90 FERC at 61,619.

<sup>57</sup>Such incentive proposals for the transmission owners must reward or penalize the transmission owners for actions they (instead of RTO West) control (e.g., incentives to reduce operating and maintenance costs or incentives to expand the grid) in a manner consistent with Order No. 2000. See Southern Company Services, Inc., 94 FERC ¶ 61,271 at 61,965 (2001).

<sup>58</sup>Innovative rate treatments may be proposed in the context of ISOs, transcos, or other forms of RTO organization.

<sup>59</sup>Order No. 2000 at 31,192.

<sup>60</sup>TransConnect Application, Transmittal Letter at 13.

West tariff requirements, RTO West, as the exclusive administrator of its tariff, must retain the ability to reconcile differences in those proposals with its tariff design.

Consequently, TransConnect is not prohibited from entering into agreements with RTO West that will enable incentive proposals to be incorporated into the rate design of the transmission tariff that RTO West files with the Commission, nor is it prohibited from unilaterally making a section 205 filing with the Commission that incorporates incentives or performance based rates as part of its revenue requirement, after consulting with RTO West. Accordingly, we direct RTO West to amend the Transmission Operating Agreement consistent with this finding.

We will similarly require that the Transmission Operating Agreement be revised to eliminate the authority of those transmission owners that are not independent of market participants, to unilaterally file with the Commission to establish or change rates under the region-wide RTO tariff. Of course, each transmission owner remains free to identify and update its revenue requirement and to propose its desired rate design to recover that revenue requirement within the context of RTO West rules. And, as discussed above, transmission owners may enter into agreements with RTO West regarding their revenue requirement and how it will be recovered through the RTO West Tariff and file such agreements with the Commission as rate schedules. Furthermore, transmission owners can make such revenue requirement filings unilaterally to the Commission where they cannot reach consensus with RTO West. Ultimately, however, once a particular revenue requirement is approved by the Commission, it is the responsibility of RTO West, as the sole administrator of the transmission tariff for the region, to incorporate the revenue requirements of each of its members (including any innovative pricing proposal by transmission owners who have elected to become independent of market participants) into a single, cohesive transmission tariff it will administer for the region.

#### **D. Planning and Expansion**

As an initial matter, we note that RTO West Applicants have not asked for approval of the planning and expansion function. The details regarding this function will be part of their Stage 2 filing. Nevertheless, TransConnect Applicants request that TransConnect be permitted to share this function with RTO West.

RTO West indicates that it shall have primary responsibility for planning of the RTO West Controlled Transmission Facilities and shall have the right to review proposals for additions or modifications to all such facilities. TransConnect and other transmission owners participating in RTO West will have responsibility for planning

their transmission facilities and for making additions modifications, and expansions if (1) the Commission determines that such Participating Transmission Owner is independent from control of market participants, or (2) the Participating Transmission Owner is entitled to exercise such authority.<sup>61</sup>

TransConnect Applicants state that TransConnect's participation in planning and expansion will benefit not only its members and stockholders, but also RTO West, through improvement of the grid and reduced congestion. Additionally, TransConnect Applicants state that by providing a profit motive for the planning and development of new transmission, transmission will be built efficiently and will be designed to meet the economic needs of the region. As a for-profit, multi-state ITC, TransConnect Applicants maintain that TransConnect will be better positioned to undertake multi-state, regional projects.

### Comments

Utah AMPS states that the Commission should deny or qualify TransConnect Applicants' request to engage in planning and expansion. Although they believe TransConnect should participate in the process, they do not believe TransConnect should possess unilateral decision making authority. According to Utah AMPS, RTO West must be able to make final decisions among competing proposals for expanding capacity or relieving congestion, and RTO West must have the authority to reject a proposed TransConnect expansion in favor of a more cost effective option.

The Northwest IPP/Marketers Group states that because the proposals are incomplete, it is premature for the Commission to evaluate the appropriateness of TransConnect performing RTO planning functions until RTO West and TransConnect Applicants submit their Stage 2 filings. In addition, they question whether independence alone is sufficient for the Commission to authorize TransConnect to perform planning

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<sup>61</sup>Section 12.2 of the RTO West Transmission Operating Agreement states, in part:

RTO West shall retain primary planning responsibility and final decision-making authority with respect to RTO West Controlled Transmission Facilities; provided that if the additions modifications and expansions to such facilities do not impair reliability or Total Transfer Capability of the RTO West Controlled Transmission System, the requested approval of RTO West shall not be unreasonably delayed or withheld.

services on behalf of the RTO. They also doubt TransConnect will provide least-cost transmission planning solutions for the RTO West transmission system. The Northwest IPP/Marketers Group seeks impartial consideration of transmission and non-transmission solutions by RTO West planners.

PPC states that a major benefit cited for creating RTO West was that it would provide for unified transmission planning for the region. By engaging in transmission planning independent of the RTO, TransConnect weakens this justification. According to PPC, the Commission should not allow TransConnect to retain those planning responsibilities that they believe should be assumed by the RTO West.

Public Interest Organizations urge the Commission to find that those planning and transmission development functions proposed by TransConnect Applicants and RTO West Applicants are flawed, fail to meet Order No. 2000 requirements and should be rejected. According to Public Interest Organizations, RTO West negotiations for planning and expansion centered around two basic alternatives: (1) a market approach, under which the RTO would coordinate and assist with the actions of market participants to react to price signals in the transmission market; and (2) an RTO "backstop" approach, under which RTO West would have the ultimate authority to direct expansion projects. After lengthy discussion, RTO West ultimately adopted the backstop approach. However, Public Interest Organizations allege that the planning and expansion framework filed by RTO West Applicants falls between the two approaches because of efforts to accommodate the planning and expansion role proposed for TransConnect. As a result, Public Interest Organizations claim that the least-cost planning role envisioned for the RTO that was originally included as part of the backstop approach is gone. In addition they claim that the proposal precludes RTO West from considering non-transmission solutions.

#### TransConnect Applicants' Response

TransConnect Applicants state that the right to plan, propose and where appropriate, compete with alternative proposals for building new transmission is an essential benefit provided by an ITC which is independent of any market participant. As a for-profit business focused on transmission, an ITC will have incentives to identify areas where there is a need for new facilities and ensure that such facilities are built. However, TransConnect Applicants state that the ITC does not intend to preempt the planning responsibilities of RTO West. They reiterate that ". . .RTO West shall retain primary planning responsibility and final decision-making authority with respect to RTO West Controlled Transmission Facilities."

TransConnect Applicants dispute the notion that the ITC would construct transmission and ignore other alternatives. According to TransConnect Applicants, no new transmission will be built unless it is consistent with RTO West planning concerns. Also TransConnect Applicants state that any proposed expansion will be subject to applicable siting provisions of state laws which require review and consideration before transmission is built. In addition, the ITC will be created as a for-profit company with an incentive to favor the most economically efficient proposal. Because transmission solutions are often the highest cost, highest lead time solutions, if there are other less capital intensive solutions that would serve as a viable alternative, a rational economic decision-making process, based on an appropriate profit motivation should yield the most economically efficient outcome. TransConnect Applicants seek preliminary guidance from the Commission that the limited planning function retained by the ITC is consistent with Order No. 2000.

### Commission Response

In Order No. 2000, the Commission concluded that:<sup>62</sup>

[T]he RTO must have ultimate responsibility for both transmission planning and expansion within its region. The rationale for this requirement is that a single entity must coordinate these actions to ensure a least cost outcome that maintains or improves existing reliability levels.

As noted above, the only issue for consideration at this time is whether TransConnect should be permitted to share the planning and expansion function with RTO West. Although the detailed description of this function is to be filed in a Stage 2 filing, we will provide guidance regarding the general principles that have been described in the applications. Section 12.2 of the Transmission Operating Agreement establishes that RTO West will have primary responsibility and final decisionmaking authority for transmission planning and expansion of transmission facilities under the operational control of RTO West. The aspect of the proposal regarding RTO West's authority is consistent with the requirements of Order No. 2000. We also have indicated that dual responsibility for certain functions required of an RTO in Order No. 2000, including transmission planning and expansion, could be shared by

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<sup>62</sup>Order No. 2000 at 31,164.

transmission entities in a region as long as the plan is sufficiently detailed and provides clarity about the decisional process for the Commission to evaluate the proposal.<sup>63</sup>

Intervenors are concerned because the Transmission Operating Agreement states that "if the additions, modifications, and expansions to such facilities do not impair reliability or Total Transfer Capability of the RTO West Controlled Transmission System, the requested approval of RTO West shall not be unreasonably delayed or withheld." We agree that the planning and expansion proposal set forth in the Transmission Operating Agreement could result in transmission expansion that, although not inconsistent with reliability, may not treat transmission (wires) and non-wires (*i.e.*, generation and perhaps demand-side actions) solutions objectively and neutrally if RTO West does not consider least cost planning in its approval process. Because it is not clear whether, and if so how, RTO West will reflect least cost planning in its decisionmaking process, we will direct RTO West Applicants and TransConnect Applicants to further explain in their Stage 2 filings how they will share the transmission planning and expansion responsibilities and how non-wires solutions will be considered in the decisionmaking process. Accordingly, we reserve final judgment on TransConnect's request until a more detailed planning and expansion proposal is filed.

## **E. RTO West Scope and Regional Configuration**

### RTO West's Proposal

RTO West Applicants request that the Commission issue a declaratory order finding that its proposed scope and configuration meet or exceed the minimum requirements. RTO West proposes to cover the transmission systems of all transmission owners willing to participate within the Northwest Power Pool and accommodate additional facilities within the Western Systems Coordinating Council. The proposed framework also includes participation by British Columbia and Alberta entities. RTO West will encompass the major existing control areas within eight western states and will: (1) provide Total Transfer Capacity and Available Transfer Capacity determinations for all paths under its control, (2) be the sole entity to manage transmission congestion through a proposed physical rights model, (3) eliminate transmission rate pancakes, (4) possess the control authority to effectively address loop flow issues within its boundaries, (5) improve operation of the transmission grid by consolidating control area operator functions, and (6) have a transmission planning Board Advisory Committee back stop role for meeting load service obligations and identifying reliability problems.

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<sup>63</sup>See, *e.g.*, Commonwealth.

Approximately 99 percent of the transmission service on facilities that will become a part of RTO West is provided to the parties that are within the control boundaries of RTO West.

## 1. Geographic Size

### Comments

The majority of comments support RTO West's scope and configuration. Some commenters believe it is inappropriate for FERC to rule on the scope and configuration of RTO West because the filing is not yet complete and excludes major documents. Many intervenors argued that the geographic size should be larger while others argued it should be smaller. Modesto Irrigation District requests that the Commission analyze Western electricity markets as a substantially integrated whole. Powerex suggests that the Commission encourage a West-wide RTO by ensuring Canadian utilities are a part of the RTO and expand on to Desert Star and California. The Public Generating Pool argues that RTO West is too small in that it does not have an adequate provision for including non-jurisdictional entities.

BC Hydro offers support of RTO West's scope and configuration framework in that it will provide consistent RTO transmission service while giving due regard to Canadian sovereignty. The Washington Utilities and Transportation Commission and Williams Companies also encourage the continued efforts of RTO West to include British Columbia and Alberta and to preserve this flexibility.

### Response of RTO West Applicants

RTO West Applicants concur with Powerex that a West-wide RTO is a laudable long-term goal. However, Applicants submit that integration of the RTO West region with the other RTOs in the West is infeasible at this time. RTO West Applicants assert that RTO West has adequate provisions for including non-jurisdictional entities. RTO West Applicants argue their proposal accommodates non-jurisdictional entities and allows for their participation in RTO West.<sup>64</sup>

### Commission Response

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<sup>64</sup>See RTO West Application, Transmittal Letter at 54-55.

The Commission's principal consideration in evaluating the appropriate scope of an RTO is that the region should be of sufficient scope and configuration as to permit the RTO to effectively perform its required functions and to support efficient and nondiscriminatory power markets. RTO West's proposed boundaries will encompass a significant single contiguous geographic region ranging from the United States - Canadian border to the southern tip of the state of Nevada. This is a region of approximately 580,000 square miles across eight states and includes the transmission facilities of nine utilities including Bonneville. As proposed, RTO West will operate more than 90 percent of the existing high voltage transmission facilities within its proposed geographic scope.

We also recognize that RTO West has worked with Canadian entities to provide a framework that would provide consistent RTO transmission service over RTO West transmission system and Canadian transmission systems, while recognizing Canadian sovereignty and regulatory structures. In light of Canada's involvement in the Western marketplace, the Commission supports the efforts to accommodate Canadian participation in RTO West.

We stated in Order No. 2000 that there is likely no one "right" configuration of the regions. The overarching objective of that order "is a single, coordinated and transparent bulk power market in each region, irrespective of the number of transmission entities that support that market."<sup>65</sup> Historical relationships and the events of this past summer leave no doubt of the interstate nature of the electric systems in the Western Interconnection. As early as the 1970's, the utilities in the West confronted the regional nature of their operations in the form of significant loop flows and, in the 1990's agreed on a regional solution.<sup>66</sup>

The Commission finds that RTO West, which encompasses a significant portion of the Western Interconnection, can serve as an anchor for the ultimate formation of a West-wide RTO. We believe that the scope and configuration as proposed in its Stage 1 filing will permit RTO West to perform its functions efficiently. In addition, as proposed, we find RTO West's regional boundaries will begin to facilitate and optimize the competitive, reliability, efficiency, and other benefits that RTOs are intended to achieve. In consideration of the above, we conclude that RTO West Applicants' proposed scope and configuration are consistent with Order No. 2000.

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<sup>65</sup>Commonwealth, 90 FERC at 61,617.

<sup>66</sup> See Southern California Edison Company, et al., 70 FERC ¶ 61,078 and 73 FERC ¶ 61,219 (1995).

In a letter submitted on April 23, 2001, the Secretary of Energy states, "I am aware that some believe a single RTO in the Western United States is a better solution than the regional approach proposed. The Department supports the development of seamless electricity markets. However, we believe the best way to achieve this goal is to take thoughtful first steps that the region can support. . . I believe the best way to achieve the balance between a healthy Western electricity market and regional reliability needs is to create strong, regional RTOs and allow them to develop seamless market interfaces."

We agree that a West-wide RTO is the most efficient outcome for the West and will direct the parties, in addition to completing their efforts to form RTO West, to work towards this ultimate goal. While many parties have indicated that combining the West into a single RTO is problematic in the short term, they agree that a single RTO should be pursued.<sup>67</sup> In fact, numerous Western organizations, including stakeholders in California, the Pacific Northwest, the Desert Southwest, and Canadian entities, have undertaken a number of efforts that have resulted in meaningful dialogue regarding seams and inter-regional coordination issues in the West, and that have established the foundation for parties to pursue further consensus on West-wide RTO issues. These efforts include the following:<sup>68</sup>

- In 1999, commercial practice committees in the Western Interconnection and the Western Systems Coordinating Council jointly formed a Western Market Interface Committee (the WMIC) to address seams-related issues.
- RTO West has formed a work group to address seams issues with other RTOs, control areas and transmission-owning utilities within the RTO West service area, and has coordinated with WMIC. Among issues being addressed by this work group are reciprocal elimination of pancaked transmission charges among RTOs operating in the Western Interconnection, operational compatibility, and other issues.

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<sup>67</sup>See, e.g., Response of the California Independent System Operator Corporation to Protests and Comments on Submission Describing Progress Toward Formation of Regional Transmission Organization, filed on March 9, 2001 in Docket No. RT01-85-000.

<sup>68</sup>See RTO West Application, Transmittal Letter at 75-80.

- RTO West and the California ISO have created a joint technical group to work on inter-regional coordination issues, have met and have planned additional meetings.<sup>69</sup>
- Representatives of Desert STAR and RTO West are engaged in discussions to identify physical interfaces, to review scheduling timelines and control area configurations, and to discuss issues such as transmission pricing, cost shifts, export charges, congestion management proposals, firm transmission rights allocation, and the treatment of parallel flows.<sup>70</sup> The discussions addressed coordinated implementation of the RTOs to minimize impacts to market participants and to potentially capture scale economies.
- There are currently efforts within the Western Interconnection to form a new organization, the Western Interconnection Organization, (WIO), which would perform interconnection-wide reliability and market interface functions and to coordinate between regional entities within the Western Interconnection. RTO West Applicants state that they anticipate that this organization will facilitate and coordinate the integration of reliability and market interface practices.
- As noted above, RTO West Applicants and Canadian entities have worked, and continue to work, closely together to facilitate participation by Canadian entities in RTO West.

We are encouraged by the actions noted above that parties have voluntarily initiated, and direct RTO West Applicants to continue working toward the common goals of minimizing seams issues, improving inter-regional coordination, and ultimately establishing a single West-wide RTO. We direct RTO West Applicants to file with the Commission no later than December 1, 2001, a status report detailing, among other things, (1) resolutions of seams issues, (2) plans for participation in RTO West by Canadian entities, (3) a framework for formation of a West-wide RTO, and (4) a timetable for achieving a West-wide RTO end state.<sup>71</sup>

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<sup>69</sup>RTO West Applicants have indicated that a mid-April 2001 meeting is scheduled among RTO West, Desert STAR, and the California ISO.

<sup>70</sup>RTO West Applicants have indicated that meetings were held on February 27, 2001 and March 30, 2001 with another meeting scheduled for April 26, 2001.

<sup>71</sup>We are issuing concurrently an order in *San Diego Gas & Electric Company v.*  
(continued...)

## 2. Inclusion of Nevada Power and Sierra Pacific

### Comments

Some commenters protest the inclusion of Nevada Power and Sierra Pacific in RTO West.<sup>72</sup> PPC states that the inclusion of those companies in RTO West could expose Northwest public power utilities and their consumers to additional uplift costs and would increase cost shifts across RTO West seams. PUCN states that it is imperative that rates in the other zones that Nevada must interface with are nondiscriminatory. Many intervenors claim that RTOs should encompass one contiguous geographic area, that Nevada Power's facilities are better integrated and interconnected with the Southwest, and that they are therefore more functionally aligned with another RTO in the Desert Southwest.

### Commission Response

While Nevada Power and Sierra Pacific may not be directly interconnected with the other Applicants of RTO West, we will not limit the boundaries for RTO West. Both companies currently operate in a separate single control area, thereby minimizing operational difficulties or seams issues. RTO West Applicants state that "including Nevada Power in RTO West should tend to reduce the per-unit uplift charge and thereby promote efficiency as long as adding additional participants does not lead to large investment in fixed costs."<sup>73</sup> We agree with this assessment and see no adverse effect in Nevada Power joining RTO West. In addition, Nevada Power will contribute to RTO

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<sup>71</sup>(...continued)

Sellers of Energy, et al., Docket No. EL00-95-012, in which we condition the market monitoring and mitigation plan adopted therein on the California ISO and the State's three investor-owned utilities filing an RTO proposal by June 1, 2001, consistent with the characteristics and functions in Order No. 2000. We expect RTO West (as well as participants in other RTO efforts under consideration in the West) to work cooperatively with the California ISO to develop comprehensive solutions to the problems confronting western markets.

<sup>72</sup>The Public Generating Pool, Nevada Attorney General's Bureau of Consumer Protection, Southern Nevada Water Authority, Valley Electric Association, and Colorado River Commission.

<sup>73</sup>RTO West Applicants Answer to Motions to Consolidate and Request for Leave to File Answer to Protests to the RTO West October 23, 2000 filing.

West's ability to satisfy its required functions of supporting efficient and non-discriminatory power markets. We further note that Nevada Power recently merged with Sierra Pacific.<sup>74</sup> It is appropriate that these entities be included in the same RTO. Therefore, we conclude that the inclusion of Nevada Power and Sierra Pacific in RTO West's scope and regional configuration is appropriate and meets the objective of Order No. 2000.

### 3. Authority of Bonneville to Participate in RTO West

#### Comments

Industrial Customers of Northwest Utilities state that Bonneville is without legal authority to participate in RTO West and that its obligation to retain control over the federal transmission facilities creates a potential conflict with RTO West independence. The Affiliated Tribes of Northwest Indians voice concern that Bonneville has several statutory, treaty, and other responsibilities applicable with the operation of the Federal Columbia River Transmission System, and that Bonneville's ability to honor obligations to protect tribal assets, including fish and wildlife, as well as cultural resources, should not be compromised. Furthermore, Affiliated Tribes of Northwest Indians state that RTO West should not require, and Bonneville should not agree to allow, a private corporation's decisions to supercede Federal decisions related Bonneville's operations. Similarly, the PPC states that pursuant to statute, Bonneville must recover sufficient revenues to cover its total system costs which include payments to the U.S. Treasury and third-party bondholders. The PPC points out that Bonneville's obligations are at risk if the pricing model fails or if transfer payments necessary to reimburse Bonneville are insufficient. In light of these obligations, the PPC believes that Bonneville should not turn over its transmission facilities to RTO West until Bonneville is assured that these obligations will be met. BC Hydro comments that, in view of Bonneville's unique statutory and treaty policies, the Commission should make reasonable accommodations to permit Bonneville's participation in RTO West.

#### Commission Response

Because Bonneville is not a public utility under the Federal Power Act, it is not required to comply with Order No. 2000. Rather, the legality of Bonneville's decisions is

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<sup>74</sup>See Sierra Pacific Power Company, Inc., 87 FERC ¶ 61,007 (1999); reh'g denied, 88 FERC ¶ 61,058 (1999).

within the purview of Bonneville and the Department of Energy. Nevertheless, Bonneville has participated extensively in, and contributed greatly to, the collaborative process and has joined in the RTO West filing as a concurring party. In light of Bonneville's desire to participate in the formation of RTO West, the RTO West Applicants have included numerous provisions in the Transmission Owners Agreement that would be executed by Bonneville upon it joining RTO West.<sup>75</sup> Those provisions represent the parties' attempt to provide sufficient assurances, protections and abilities for Bonneville to continue to meet its statutory, treaty, contractual and other responsibilities to provide service. Although certain intervenors question whether Bonneville is adequately protected, we believe that such concerns are more appropriately addressed in proceedings that Bonneville will initiate pursuant to its statutory requirements under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act).<sup>76</sup> Unlike our statutory authority under the Federal Power Act, the Commission's authority under sections 7(a) and (k) of the Northwest Power Act does not include the power to modify Bonneville's rates. The responsibility for developing rates in the first instance lies with Bonneville's Administrator which provides for a public process to hear concerns about a Bonneville proposal. Once rates are approved by the Administrator, the rates are submitted to the Commission for approval or disapproval. The Commission's review of Bonneville's regional power and transmission rates is limited to determining whether Bonneville's proposed rates are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator's other costs. In this regard, the Commission's role can be viewed as appellate: to affirm or remand the rates submitted to us for review.<sup>77</sup> Consequently, intervenors' comments are, at best, premature.

Other intervenors question whether Bonneville has the statutory ability to join RTO West. As noted above, Bonneville is subject to limited Commission jurisdiction as a federal power marketing agency. Consequently, Bonneville's decision or ability to join RTO West is not subject to review by this Commission. Furthermore, any approval by the Commission of RTO West does not grant Bonneville, or any other participant, an

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<sup>75</sup>See generally, RTO West Application, Transmittal Letter at 46-51.

<sup>76</sup>Sections 7(a)(2) and 7(i)(6), 16 U.S.C. §§ 839e(a)(2) and 839e(i)(6) (1994).

<sup>77</sup>See, e.g., *Aluminum Company of America v. Bonneville Power Administration*, 903 F.2d 585, 592-93 (9th Cir.1989), cert denied sub nom. *California Public Utilities Commission v. FERC*, 498 U.S. 1024, III S.Ct. 672, 112 L.Ed 2d 665 (1991), and cases cited therein.

exemption from obtaining necessary approvals from other bodies, regulatory or otherwise, to join RTO West.

#### 4. Facilities Under RTO West Operational Control

##### Comments

A number of intervenors criticize the delineation of facilities which will be under RTO West operational control (and included in RTO West rates under the Transmission Operating Agreement). Intervenors argue that RTO West's operational control will not extend to all significant facilities within its geographic area. Several intervenors state that RTO West must make clear that no high or low voltage transmission facilities that are used to serve wholesale loads from within RTO West should be excluded from its operational control. Some intervenors point out that since the definition is dependent upon elements that are incomplete, such as the impact of congestion zones on various RTO transfer capabilities, transmission owners could game the system in an effort to retain control over certain facilities, or could exclude jurisdictional transmission facilities used to serve wholesale customers from RTO West control.

##### Commission Response

As a part of our review of this Stage 1 filing, we are neither reviewing nor determining the facilities that will be controlled by RTO West and those that will remain with the companies. At this time, we are reviewing only the general parameters of RTO West's scope and configuration. We will review and comment on the details of the facilities that will be under RTO West's control when the details of what facilities are to be under its control have been determined as a part of RTO West's Stage 2 filing. That being said, as RTO West is working on its Stage 2 application, we emphasize that for an RTO to satisfy our scope and configuration characteristics, most or all of the transmission facilities in a region should be operated by the RTO, as well as those necessary for operational control and management of constrained paths, regardless of the voltage. Some of these facilities may currently operate as higher voltage distribution lines while others may be a lower voltage radial line that is considered essential for wholesale transmission service.

## **IV. Limited Liability Agreement**

### RTO West Proposal

RTO West's Transmission Operating Agreement requires parties to execute a multiparty Agreement Limiting Liability Among RTO West Participants (Liability Agreement).<sup>78</sup> RTO West Applicants propose to incorporate the Liability Agreement into the Transmission Operating Agreement. The Liability Agreement limits the liability of parties to RTO West through a "no fault" liability structure for electric system property damage, a tariff limitation of liability for service interruptions, and indemnity provisions for bodily injury claims.

According to RTO West Applicants, the limitation of liability model adopted by RTO West attempts to preserve the status quo existing in the rate structure of Northwest utilities by continuing voluntary limitations of liability among participants that presently exist under terms of the Western Interconnected Systems (WIS) Agreement (WIS Agreement).<sup>79</sup> In addition, RTO West Applicants assert that the Liability Agreement provides limitations of liability under continuity of service tariff provisions similar to what presently exists for investor-owned transmission utilities operating under tariffs approved by respective state commissions. RTO West Applicants contemplate that RTO West would purchase general liability, errors and omission, directors and officers liability, and other insurance as customary in the industry. RTO West Applicants propose that RTO West maintain insurance coverage in a minimum amount of \$150 million in general liability and an additional \$150 million in errors and omission coverage for its operations.

### Intervenors' Comments

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<sup>78</sup>See RTO West Application, Attachment Y, Liability Agreement, and Attachment Z, Applicants' Summary of the Liability Agreement.

<sup>79</sup>In Docket No. ER94-312-000, PacifiCorp filed the WIS Agreement in response to the Commission's order in Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139, clarified, 65 FERC ¶ 61,081 (1993). In a letter order dated October 13, 1994, in Docket No. ER94-254-000, et al., the Director, Division of Electric Power Regulation determined, inter alia, that the submittal did not provide for the sale of wholesale power for resale, the provision of transmission service or the delivery of energy as compensation for transmission losses. Thus, the Director determined that, consistent with the Prior Notice order, the submittal in Docket No. ER94-312-000 need not be filed.

The intervenors argue that the Commission has previously rejected liability limitation provisions, holding that determinations of liability in instances where the transmission provider is negligent or engages in willful misconduct are best left to appropriate court proceedings, in which parties will be free to advance any appropriate arguments. The intervenors also argue that: the liability protection against end-users is overbroad and improperly shifts liability from transmission owners to end-users; the proposed \$150 million of general liability insurance and \$150 million of errors and omissions insurance may not be enough to enable an end-use customer to fully recoup its damages from RTO West; RTO West Applicants' transmission facilities should not be immune from claims by end users; the Liability Agreement fails to allow parties to recover full opportunity costs as damages for a Wrongful Dispatch Order, contrary to Order No. 2000-A; RTO West should not assume liability for contract claims that occur at a point on an electric system other than on the indemnified Party's own generation or distribution system; RTO West's liability for claims relating to facilities operation or enforcement of operational standards should be limited to those circumstances in which RTO West has the corresponding operational or standard setting responsibilities; RTO West's liability for contract claims should be limited to facilities which the RTO itself operates; RTO West should not be liable for contract claims arising from the alleged inadequacy of standards inherited from the Executing Transmission Owners; and the Liability Agreement still needs to be tailored to reflect the framework for British Columbian participation in the RTO.

#### Response by RTO West Applicants and Reply

RTO West Applicants reiterate that the Liability Agreement reflects a broad regional consensus, preserves the status quo of the WIS Agreement and protects both utilities and their native loads from being exposed to significant new liability as a result of the creation of RTO West. Furthermore, they argue that imposing the bulk of the liability risks from service interruptions upon electric providers would force those providers to incur all of the costs of incurring damages resulting from interruptions in electric service. They assert that such an imposition of liability risk would, in turn, significantly increase the cost of electric service and could render insurance unavailable at any cost.

RTO West Applicants further claim that, instead of a speculative measure of lost opportunity cost, the Liability Agreement allows generators recourse against RTO West for "lost opportunity cost" for Wrongful Dispatch Orders by including an objective measure of damage as measured by reference to the Mid-Columbia Dow Jones daily on-peak or off-peak price less costs. In addition, RTO West Applicants submit that each

generator is in a better position than RTO West to anticipate and insure against any extraordinary damages.

RTO West Applicants state that for RTO West to assume liability for contract claims that occur at a point on an electric system is entirely appropriate given RTO West's oversight, control and operation of the interconnected transmission system. Furthermore, they state that RTO West will have responsibility for determining the need for design changes for the interconnected system and should have corresponding responsibility for any present inadequacies in oversight, design, and operation.

Northwest IPPs/Marketers filed a reply to RTO West Applicants' answer. They raise objections concerning the calculation of damages for Wrongful Dispatch Orders and the agreement's definition of "Replacement Power Cost."

### Commission Response

In Order No. 888,<sup>80</sup> the Commission discussed the indemnification provision of the pro forma tariff (Section 10.2). The Commission explained that it did not believe it appropriate to require transmission customers to indemnify transmission providers in cases of negligence or intentional wrongdoing by the transmission provider.<sup>81</sup>

In Order Nos. 888-A and 888-B, the Commission further explained that the pro forma tariff does not address, and was not intended to address, liability issues. Rather, the Commission explained, transmission providers may rely on state laws, when and where applicable, protecting utilities or others from claims founded in ordinary negligence.<sup>82</sup> In subsequent cases, the Commission has consistently rejected liability

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<sup>80</sup>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), cert. granted, 69 U.S.L.W. 3574 (Nos. 00-568 (in part) and 00-809) and cert. denied, id. (No. 00-800) (U.S. Feb. 26, 2001).

<sup>81</sup>Order No. 888 at 31,765-66; Order No. 888-A at 30,301.

<sup>82</sup>Order No. 888-A at 30,301-02; Order No. 888-B at 62,080-81.

limitation provisions in tariffs involving open access transmission service.<sup>83</sup> Further, all of the Commission orders cited by RTO West Applicants (RTO West Applicants' Answer at 33-34 & n.55) for the acceptance of liability limitation provisions predate Order No. 888 and do not involve open access transmission service.

Accordingly, we reject the proposal to incorporate the Liability Agreement into the Transmission Operating Agreement. In so doing, we are not making any determination regarding the merits of the liability provisions under applicable law. The RTO Participants have alternatives with respect to liability matters. As we have explained, there is nothing in the pro forma tariff that would preclude those entities from relying "on the protection of state laws, when and where applicable protecting utilities or others from claims founded in ordinary negligence" or intentional wrongdoing.<sup>84</sup>

In Order No. 2000-A, we stated our agreement with the proposition that "generators that are redispatched by an RTO should be fully compensated and that the compensation would consider, among other things, lost opportunity costs."<sup>85</sup> While the Liability Agreement addresses this issue, the amount of compensation paid to redispatched generators properly belongs in the RTO West Tariff. The RTO West Applicants should include tariff provisions addressing this issue in their Stage 2 filing. Until then, we reserve judgment on the substance of those provisions.

The Commission Orders:

(A) The motions to intervene out of time in these proceedings are hereby granted, as discussed in the body of this order.

(B) RTO West and TransConnect Applicants' answers to comments and protests are hereby granted, as discussed in the body of this order.

(C) The requests for consolidation of these proceedings and for an evidentiary hearing are hereby denied, as discussed in the body of this order.

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<sup>83</sup>See, e.g., Arizona Public Service Co., 94 FERC ¶ 61,027 at 61,082 (2001); New York Independent System Operator, Inc., 90 FERC ¶ 61,015 at 61,034, order on reh'g, 91 FERC ¶ 61,012 at 61,051 & n.23 (2000); Pacific Gas and Electric Co., et al., 81 FERC ¶ 61,122 at 61,520-21 (1997).

<sup>84</sup>See Order No. 888-A at 30,301; see also Order No. 888-B at 62,081.

<sup>85</sup>Order No. 2000-A at 31,373.

(D) RTO West Applicants' request for a declaratory order is hereby accepted subject to the conditions discussed in the body of this order. RTO West Applicants are hereby directed to submit as part of their Phase 2 filing revisions to the RTO West Transmission Operating Agreement and Bylaws, as discussed in the body of this order.

(E) TransConnect Applicants' request for a declaratory order is hereby accepted subject to the conditions discussed in the body of this order. TransConnect Applicants are hereby directed to submit their Phase 2 filing consistent with the revisions discussed in the body of this order.

(F) RTO West Applicants are hereby directed to file a status report by December 1, 2001, as discussed in the body of this order.

By the Commission.

( S E A L )

David P. Boergers,  
Secretary.

## **Appendix A**

### **Timely Motions to Intervene, Notices of Intervention, Protests and Comments Parties in Docket No. ER01-35-000**

Avista Energy, Inc. (Motion to Intervene and Comments)  
Affiliated Tribes of Northwest Indians-Economic Development Corporation (Motion to Intervene and Comments)  
Alcoa, Inc., Columbia Falls Aluminum Company, and Kaiser Aluminum & Chemical Corporation (Motion to Intervene)  
Altofina Chemicals, Inc., Goldendale Aluminum Company, and Northwest Aluminum Company (Motion to Intervene)  
American Forest & Paper Association (Motion to Intervene and Comments)  
Automated Power Exchange, Inc. (Motion to Intervene and Comments)  
Big Horn County Electric Cooperative, Inc. (Motion to Intervene and Initial Comments)  
British Columbia Hydro and Power Authority (BC Hydro) (Motion to Intervene and Initial Comments) (Supplemental Comments)  
California Department of Water Resources (DWR) (Motion to Intervene)  
California Electricity Oversight Board (EOB) (Motion to Intervene)  
Central Montana Electric Power Cooperative, Inc. Motion to Intervene and Initial Comments)  
Cities of Redding and Santa Clara, California and the M-S-R Public Power Agency (Cities/M-S-R) (Motion to Intervene and Protest)  
City of Seattle (Motion to Intervene and Comments)  
Coastal Merchant Energy, L.P. (Motion to Intervene)  
Cogeneration Coalition of Washington (Motion to Intervene)  
Cogeneration Coalition of California (Motion to Intervene)  
Colorado River Commission of the State of Nevada (Motion to Intervene and Protest)  
Columbia River Inter-Tribal Fish Commission (Motion to Intervene)  
Confederated Tribes of the Umatilla Indian Reservation (Confederated Tribes) (Motion to Intervene)  
Conoco Global Power (Motion to Intervene) (Comments)  
Constellation Power Source, Inc. (Motion to Intervene and Comments)  
Dairyland Power Cooperative (Motion to Intervene and Comments)  
Deseret Generation and Transmission Cooperative, Inc. (Motion to Intervene) (Protest and Comments)  
Duke Energy Trading and Marketing, LLC (Motion to Intervene and Comments)  
Dynergy, Inc. (Motion to Intervene) (Comments)  
Edison Mission Energy and Edison Mission Marketing & Trading, Inc. (Motion to Intervene and Comments)

Electricity Consumers Resource Council (ELCON), the American Iron and Steel Institute (AISI), American Forest and Paper Association (AF&PA) (collectively Industrial Consumers) (Comments)

Electric Power Research Institute, Inc. (EPRI) (Comments)

Electric Power Supply Association (EPSA) (Motion to Intervene and Comments)

Enron Power Marketing, Inc. (Motion to Intervene) (Comments)

Eugene Water & Electric Board (Motion to Intervene)

Consumer-Owned Utilities (Protest and Comment)

Idaho Consumer Owned Utilities Association, Idaho Energy Authority, Northwest Requirements Utilities, Pacific Northwest Generating Cooperative, Power Resources Manager, LLP, Public Utilities District No. 1 of Snohomish County, WA, Utah Associated Municipal Power Systems, and Western Public Agencies Group

Idaho Energy Authority (Motion to Intervene)

Idaho Public Utilities Commission (Notice of Intervention and Comments)

Industrial Customers of Northwest Utilities (Motion to Intervene)

Market Access Coalition (Motion to Intervene)

Micron Technology, Inc. (Comments)

Modesto Irrigation District (Motion to Intervene and Protest)

Montana Consumer Counsel (Motion to Intervene)

Montana Department of Environmental Quality and Montana Public Service Commission (Comments)

Morgan Stanley Capital Group, Inc. (Motion to Intervene and Comments)

National Rural Electric Cooperative Association (NRECA) (Motion to Intervene)

Nevada Bureau of Consumer Protection (Motion to Intervene)

Nevada Independent Energy Coalition (Motion to Intervene)

Northwest IPPs/Marketers Group (Motion to Intervene and Protest)

Cogeneration Association of California

Cogeneration Coalition of Washington

Duke Energy North America, LLC

Dynegy Power Marketing, Inc.

National Energy Systems Company

Nevada Independent Energy Coalition

PG&E National Energy Group, Inc.

PPL EnergyPlus, LLC

PPL Montana, LLC

Reliant Energy Services, Inc.

TransAlta Energy Marketing, (U.S.), Inc.

Northwest Power Planning Council (Comments)

Northwest Requirements Utilities (Motion to Intervene)

Nucor Steel (Motion to Intervene and Comments)  
Oregon Office of Energy (Motion to Intervene and Protest)  
Pacific Gas and Electric Company (Motion to Intervene)  
Pacific Northwest Generating Cooperative (PNGC) (Motion to Intervene, Comments and Protest)  
Power Pool of Alberta, Alberta department of Resource Development, and EBSI Alberta, Ltd. (Motion to Intervene, Answer and Comments)  
Powerex Corp. (Motion to Intervene and Initial Comments)  
Public Generating Pool (Motion to Intervene)  
Public Interest Organizations (Motion to Intervene and Protest)  
    Northwest Energy Coalition  
    Renewable Northwest Project  
    Natural Resources Defense Council  
    Project for Sustainable FERC Energy Policy  
    American Wind Energy Association  
Public Utilities Commission of Nevada (Notice of Intervention and Comments)  
Public Power Council (Motion to Intervene and Protest)  
Public Utility District No. 1 of Cowlitz County, WA (Cowlitz County) (Motion to Intervene)  
Public Utility District No. 1 of Douglas County, WA (Douglas County) (Motion to Intervene)  
Public Utility District No. 2 of Grant County, WA (Grant County) (Motion to Intervene)  
Public Utility District No. 1 of Pend Oreille County, WA (Pend Oreille County) (Motion to Intervene)  
Public Utility District No. 1 of Snohomish County, WA (Snohomish County) (Motion to Intervene and Protest)  
PG&E National Energy Group, Inc. (Motion to Intervene)  
Sacramento Municipal Utility District (Motion to Intervene)  
Salt River Project Agricultural Improvement and Power District (Motion to Intervene)  
Sierra Pacific Power Company and Nevada Power Company (Comments)  
Southern Energy Nevada, L.L.C. (Motion to Intervene)  
Southern Nevada Water Authority (Motion to Intervene and Protest)  
Springfield Utility Board (Comments)  
Tenaska, Inc. (Motion to Intervene)  
Tractebel Energy Marketing, Incl and Tractebel Power, Inc. (Motion to Intervene and Comments)  
TransAlta Corporation (Motion to Intervene and Protest)  
Transmission Agency of Northern California (TANC) (Motion to Intervene and Protest)  
Truckee Donner Public Utility District (Motion to Intervene and Comments)

Utah Associated Municipal Power Systems (Utah AMPS) (Motion to Intervene and Protest)

Utah Association of Energy Users, IHC Hospitals, Inc., Hexcel Corporation, Con Agra Beef company, and Western Electrochemical Company (UAE Intervention Group) (Motion to Intervene)

Utah Division of Public Utilities (Utah DPU) and Utah Public Service Commission (Utah Commission) (Motion to Intervene)

Utah Municipal Power Agency (Motion to Intervene and Protest)

Valley Electric Association (Motion to Intervene and Protest)

Wyoming Industrial Energy Consumers (Motion to Intervene and Comments)

Washington Utilities and Transportation Commission (Notice of Intervention)

Wells Rural Electric Company (Motion to Intervene)

Western Area Power Administration (Motion to Intervene)

Western Public Agencies Group (Motion to Intervene)

Williams Companies (Motion to Intervene and Comments)

Wyoming Industrial Energy Consumers (Motion to Intervene and Comments)

**Appendix B**

**Motions to Intervene, Notices of Intervention, Protests and Comments  
Filed Out of Time  
Docket No. ER01-35-000**

Barrick Goldstrike Mines, Inc. (Motion to Intervene)  
Industrial Customers of Northwest Utilities and the Direct Service Industries (Protest)  
New Mexico Public Regulation Commission (Motion to Intervene)  
Public Generating Pool (Protest and Comments)  
Shell Energy Services Company, L.L.C.  
Washington Office of Trade and Economic Development (Comments)  
Washington Utilities and Transportation Commission (Comments)  
Wyoming Public Service Commission (Motion to Intervene)

## **Appendix C**

### **Timely Motions to Intervene, Notices of Intervention, Protests and Comments Docket No. ER01-15-000**

Affiliated Tribes of Northwest Indians-Economic Development Corporation (Motion to Intervene)

Alcoa, Inc., Columbia Falls Aluminum Company, and Kaiser Aluminum & Chemical Corporation (Motion to Intervene)

Altofina Chemicals, Goldendale Aluminum Company, and Northwest Aluminum Company (Motion to Intervene)

American Forest & Paper Association (Motion to Intervene and Comments)

Barrick Goldstrike Mines, Inc. (untimely Motion to Intervene)

Big Horn County Electric Cooperative, Inc. (Motion to Intervene and Initial Comments)

Bonneville Power Administration (Motion to Intervene)

BP Energy Company (Motion to Intervene)

California Electricity Oversight Board (Motion to Intervene)

Central Montana Electric Power Cooperative, Inc. (Motion to Intervene and Comments)

Cities of Redding and Santa Clara, California and the M-S-R Public Power Agency (Cities/M-S-R) (Motion to Intervene and Protest)

City of Seattle (Motion to Intervene and Comments)

Colorado River Commission of the State of Nevada (Motion to Intervene)

Columbia River Inter-Tribal Fish Commission (Motion to Intervene)

Conoco Global Power (Motion to Intervene) (Comments)

Constellation Power Source, Inc. (Motion to Intervene)

Consumer-Owned Utilities (Protest)

Idaho Consumer Owned Utilities Association, Idaho Energy Authority, Northwest Requirements Utilities, Pacific Northwest Generating Cooperative, Market Access Coalition, Public Utilities District No. 1 of Snohomish County, WA, Utah Associated Municipal Power Systems, and Western Public Agencies Group

Coastal Merchant Energy, L.P. (Motion to Intervene)

Colorado River Commission of the State of Nevada (Motion to Intervene)

Duke Energy Trading and Marketing, LLC (Motion to Intervene and Comments)

Dynegy, Inc. (Motion to Intervene) (Comments)

Edison Mission Energy and Edison Mission Marketing & Trading, Inc. (Motion to Intervene and Comments)

Enron Power Marketing, Inc. (Motion to Intervene and Comments)

Electricity Consumers Resource Council (ELCON), the American Iron and Steel Institute (AISI), American Forest and Paper Association (AF&PA) (collectively Industrial Consumers) (Comments)

Electric Power Research Institute (Comments)

Electric Power Supply Association (Motion to Intervene and Comments)

Enron Power Marketing, Inc. (Motion to Intervene) (Comments)

Entergy Power Generation Corporation (Motion to Intervene)

Idaho Energy Authority (Motion to Intervene)

Idaho Power Company (Motion to Intervene)

Industrial Customers of Northwest Utilities (Motion to Intervene)

Market Access Coalition (Motion to Intervene)

Benton County Public Utility District

Franklin County Public Utility District

Grays Harbor Public Utility District

City of Richland Energy Service Department

Tractebel Electricity & Gas international

Modesto Irrigation District (Motion to Intervene and Protest)

National Rural Electric Cooperative Association (Motion to Intervene)

Nevada Bureau of Consumer Protection (Motion to Intervene)

Northwest IPPs/Marketers Group (Motion to Intervene and Protest)

Cogeneration Association of California

Cogeneration Coalition of Washington

Duke Energy North America, LLC

Dynegy Power Marketing, Inc.

National Energy Systems Company

Nevada Independent Energy Coalition

PG&E National Energy Group, Inc.

PPL EnergyPlus, LLC

PPL Montana, LLC

Reliant Energy Services, Inc.

TransAlta Energy Marketing, (U.S.), Inc.

Northwest Requirements Utilities (Motion to Intervene)

Pacific Northwest Generating Cooperative (Motion to Intervene, Comments and Protest)

PacifiCorp (Motion to Intervene)

PG&E National Energy Group (Motion to Intervene)

Public Generating Pool (Motion to Intervene)

Public Interest Organizations (Motion to Intervene and Protest)

Northwest Energy Coalition

Renewable Northwest Project

Natural Resources Defense Council

Project for Sustainable FERC Energy Policy  
American Wind Energy Association  
Public Power Council (Motion to Intervene and Protest)  
Public Utilities Commission of Nevada (Notice of Intervention and Comments)  
Public Utility District No. 1 of Cowlitz County, WA (Motion to Intervene)  
Public Utility District No. 1 of Douglas County, WA (Motion to Intervene)  
Public Utility District No. 2 of Grant County, WA (Motion to Intervene)  
Public Utility District No. 1 of Pend Oreille County, WA (Motion to Intervene)  
Public Utility District No. 1 of Snohomish County, WA (Motion to Intervene and Protest)  
Reliant Energy Power Generation, Inc. (Motion to Intervene)  
Sacramento Municipal Utility District (SMUD) (Motion to Intervene)  
Shell Energy Services Company, L.L.C. (Motion to Intervene)  
Southern Nevada Water Authority (Motion to Intervene)  
Tenaska, Inc. (Motion to Intervene)  
Tractebel Energy Marketing, Inc. and Tractebel Power, Inc. (Motion to Intervene and Comments)  
Transalta Corporation (Motion to Intervene and Protest)  
Transmission Agency of Northern California (TANC) (Motion to Intervene and Protest)  
Utah Associated Municipal Power Systems (Motion to Intervene)  
Valley Electric Association, Inc. (Motion to Intervene and Protest)  
Washington Utilities and Transportation Commission (Notice of Intervention)  
(Comments)  
Western Public Agencies Group (Motion to Intervene)  
Williams Companies, Inc. (Motion to Intervene and Comments)  
Wyoming Industrial Energy Consumers (Motion to Intervene and Comments)

**Appendix D**

**Motions to Intervene, Notices of Intervention, Protests and Comments  
Filed Out of Time  
Docket No. ER01-15-000**

Barrick Goldstrike Mines, Inc. (untimely Motion to Intervene)

Washington Utilities and Transportation Commission (Comments)