

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Remedying Undue Discrimination
through Open Access Transmission Service
and Standard Electricity Market Design

Docket No. RM01-12-000

NOTICE OF TECHNICAL CONFERENCE AGENDA

(December 6, 2002)

1. As announced in the Notice of Technical Conference issued on October 28, 2002, Commission staff will convene a technical conference on December 11, 2002 to discuss specific issues related to liability provisions discussed in the Notice of Proposed Rulemaking (SMD proposed rule) issued in this docket on July 31, 2002. This notice provides further organizational details and the conference agenda.
2. The conference will begin at 9:30 a.m. and will adjourn at about 1:00 p.m. It is scheduled to take place at the Commission's offices, 888 First Street, N.E., Washington, D.C., in the Commission Meeting Room on the second floor. The agenda is appended to this notice as Attachment A (additional speakers may be added before the date of the conference). The discussions will attempt to address the questions included in the SMD proposed rule, as well as additional questions and the proposed liability provisions. The discussion questions are appended to this notice as Attachment B. Attachment C includes certain liability provisions submitted to the Commission with requests to speak or with the comments filed in this rulemaking.
3. The conference is open for the public to attend, and registration is not required; however, in-person attendees are asked to notify the Commission of their intent to attend by sending an e-mail message to conferences@ferc.gov. Members of the Commission may attend the conference and participate in the discussions.
4. Transcripts of the conference will be immediately available from Ace Reporting Company (202-347-3700 or 1-800-336-6646), for a fee. They will be available for the public on the Commission's FERRIS system two weeks after the conference. Additionally, Capitol Connection offers the opportunity for remote listening and viewing of the conference. It is available for a fee, live over the Internet, via C-Band Satellite. Persons interested in receiving the broadcast, or who need information on making arrangements should contact David Reininger or Julia Morelli at the Capitol Connection

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(703-993-3100) as soon as possible or visit the Capitol Connection website at <http://www.capitolconnection.gmu.edu> and click on "FERC."

5. Questions about the conference program should be directed to:

Jignasa Gadani
Office of the General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426
(202) 502-8608
jignasa.gadani@ferc.gov

Magalie R. Salas
Secretary

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ATTACHMENT A

Schedule

9:30 – 9:35 AM **Introductions**

9:35 – 9:45 AM **Opening Remarks**
Michael Bardee, Commission Staff

9:45 – 10:45 AM **Panel 1**

Panelists:

The Honorable Angel Cartagena, Jr., Chairman, D.C. Public Service Commission.
The Honorable Robert Garvin, Commissioner, Public Service Commission of Wisconsin.
William B. Brown, Senior Vice President, McNeary Insurance Consulting Inc.
 On behalf of American Transmission Company LLC.
Steven Corneli, Director, Midwest Regulatory Policy, NRG Power Marketing, Inc.
 On behalf of EPSA.
Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington
University.
 On behalf of Edison Electric Institute.
Gary M. Rygh, Vice President, Global Power & Utility Practice Group, Morgan Stanley
& Co., Inc. On behalf of American Transmission Company LLC.

10:45-11:00 AM **Break**

11:00 – 1:00 PM **Panel 2**

Panelists:

Celia David, Transmission Policy and Strategy Vice President,
Commonwealth Edison Company.
 On behalf of Edison Electric Institute.
Daniel A. Doyle, Vice President and Chief Financial Officer, ATC Management Inc.,
Corporate Manager for American Transmission Company LLC.
 On behalf of American Transmission Company LLC.
Samuel "Walt" Coleman, Assistant General Counsel, Duke Energy.
 On behalf of Duke Energy.
Maria Gulluni, Senior Counsel, ISO New England, Inc.
 On behalf of ISO New England

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John D. McMahon, Senior Vice President and General Counsel, Consolidated Edison
Company of New York, Inc.

On behalf of New York Transmission Owners

Arnold H. Quint, Partner, Hunton & Williams.

On behalf of the New York Independent System Operator, the Midwest
Independent Transmission System Operator, Inc., and PJM Interconnection,

L.L.C.

Donald G. Stone, Attorney, Paine, Hamblen, Coffin, Brooke & Miller, LLP.

On behalf of RTO West Filing Utilities.

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ATTACHMENT B

Discussion Questions

First panel will discuss the following questions:

1. Is there a need to include liability provisions in the Commission's pro forma Standard Market Design tariff?
2. Under what circumstances should liability protection be provided in a Commission open access transmission tariff? For example, should the Commission provide such protection only when it is not available through state tariffs, or should such protection be included for all transmission uses?
3. In what instances do state tariffs (retail tariffs) continue to apply to transmission owners or transmission providers, and in what instances do they not apply?
4. Does the need for, and effect of, liability limitations differ depending on whether the transmission owner or transmission provider is a stand alone transmission company, a vertically integrated utility, or an RTO?
5. How do you accommodate state and/or governmental entities that qualify for sovereign immunity?
6. Under Order No. 888, the determination of liability in instances other than indemnification and force majeure provisions, should be left to other fora. How will the Commission administer proposed liability provisions?
7. Who now bears the risk of loss? Why should this risk be shifted?

Second panel will discuss the following questions:

1. If the Commission adopts liability provisions, should they be generic or do they need to be adopted on a regional basis?
2. Should the standards adopted in a Commission pro forma tariff reflect what was previously provided under state law? If so, how should this issue be resolved in

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the multi-state context of an Independent System Operator or Regional Transmission Operator?

3. Does the need for, and effect of, liability limitations differ depending on whether the transmission owner or transmission provider is a stand alone transmission company, a vertically integrated utility, or an RTO?
4. In drafting limiting liability provisions, who should be protected against whom? Should they protect transmission owners, transmission providers and generators as well? Are generators that follow directives of the transmission provider protected?
5. How do you address a situation where the transmission owner and/or transmission provider had more (or less) protection under the state tariff than under proposed liability provisions?
6. Should the force majeure provision and indemnification provisions mirror the protections in the limited liability provisions?
7. Should the liability provisions also be included in agreements under the tariff, for example, a participating generator agreement, a generator interconnection agreement, or a transmission owner - transmission provider agreement? In several agreements, the liability provisions between parties have been used as negotiating tools. Why is this no longer acceptable?
8. Should there be specific monetary limitation on liability (caps)? If so, on what basis should the caps be determined?
9. What factors should be considered in establishing any cap on liability. For example, should the cost and availability of liability insurance be considered?
10. What would be the potential rate impact associated with various levels of liability exposure and insurance coverage?

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ATTACHMENT C

American Transmission Company LLC

PROPOSED LIABILITY LIMITATION LANGUAGE:

Section A.7.4 Limitation of Liability:

(a) Except as provided in Section A.7.5, the Transmission Owner shall not be liable, whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any Transmission Customer, User, or any third party or other person for any damages whatsoever, including, without limitation, direct, incidental, consequential, punitive, special, exemplary or indirect damages arising or resulting from any act or omission in any way associated with service provided under this Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, except to the extent that the Transmission Owner is found liable for gross negligence or intentional misconduct, in which case the Transmission Owner will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages. Nothing in this section, however, is intended to affect obligations otherwise provided in agreements between the Transmission Provider and Transmission Owner.

(b) Except as provided in Section A.7.5, the Transmission Provider shall not be liable, whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any Transmission Customer, User, or any third party or other person for any damages whatsoever, including, without limitation, direct, incidental, consequential, punitive, special, exemplary or indirect damages arising or resulting from any act or omission in any way associated with service provided under this Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, except to the extent that the Transmission Provider is found liable for gross negligence or intentional misconduct, in which case the Transmission Provider will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages. Nothing in this section, however, is intended to affect obligations otherwise provided in agreements between the Transmission Provider and Transmission Owner.

(c) Neither the Transmission Owner nor the Transmission Provider shall be liable for damages arising out of services provided under this Tariff, including,

but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, occurring as a result of conditions or circumstances beyond the control of the Transmission Owner or Transmission Provider, as applicable, or resulting from electric system design common to the domestic electric utility industry or electric system operation practices or conditions common to the domestic electric utility industry. Transmission Owner shall not be liable for acts or omissions done in compliance or good faith attempts to comply with directives of Transmission Provider.

Section A.7.5 Limitation on Damages:

(a) Notwithstanding the limitations on liability in Section A.7.4(a), for each incident in which Transmission Owner is found liable for damages resulting from any act or omission associated with service provided under this Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, Transmission Owner's liability in total to all persons so affected shall be limited to direct damages, but in an amount not to exceed

[Alternative 1: an amount not to exceed the greater of \$500,000 or 0.0025 of the transmission owner's annual revenue from the use of the transmission system]

[Alternative 2: an amount equal to the transmission rate applicable to the transmission service that was interrupted or provided in a deficient or imperfect manner, times the duration of the interruption or period of time the service was interrupted or provided in a deficient or imperfect manner.]

except to the extent that the Transmission Owner is found liable for gross negligence or intentional misconduct, in which case the Transmission Owner will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages.

(b) Notwithstanding the limitations on liability in Section A.7.4(b), for each incident in which Transmission Provider is found liable for damages resulting from any act or omission associated with service provided under this Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, the Transmission Provider's liability in total to all persons so affected shall be limited to direct damages, but in an amount not to exceed

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except to the extent that the Transmission Provider is found liable for gross negligence or intentional misconduct, in which case the Transmission Provider will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages.

(c) For purposes of Sections A.7.5(a) and A.7.5(b), direct damages shall not include loss of profit, loss of revenue, loss of production, loss of earnings, loss of contract, or any other indirect, special or consequential loss or damage.

Duke Energy**PROPOSED LANGUAGE:****7.1 Force Majeure**

An event of Force Majeure means any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any unplanned event that is beyond a party's control that results in Curtailment, order, regulation or restriction imposed by governmental military or lawfully established civilian authorities, or any other cause beyond a Party's control. A Force Majeure event does not include an act of negligence or intentional wrongdoing. Neither the Independent Transmission Provider nor the Customer will be considered in default as to any obligation under this Tariff if prevented from fulfilling the obligation due to an event of Force Majeure; provided, however, that payment obligations for service provided pursuant to this Tariff shall not be excused by reason of a Force Majeure event. However, a Party whose performance under this Tariff is hindered by an event of Force Majeure shall make all reasonable efforts to perform its obligations under this Tariff.

7.2 Indemnification

The Customer (the "Indemnifying Party") shall at all times indemnify, defend, and ~~save the Independent Transmission Provider~~ hold harmless from, any and the Independent Transmission Provider, including its owners, directors, officers, employees, agents, consultants, advisors, representatives, and other entities to the extent that such other entities are operating facilities or otherwise performing functions subject to the direction or instruction of the Independent Transmission Provider (collectively, the "Indemnified Party") from and against all damages, losses, claims, including, but not limited to ~~claims and/or~~ actions relating to injury to or death of any person or damage to or destruction of any property (including contamination of the environment or injury to natural resources) whether contractual, in tort, or as a matter of strict liability or liability imposed by statute, regulations, or ordinances, demands, suits, recoveries, judgments, liabilities, costs and expenses, court costs, attorney fees, other professional fees, which arise out of or result ~~and all other obligations by or to third parties, arising out of or resulting from the Independent Transmission Provider's, in whole or in part, the Indemnified Party's~~ performance of its obligations under this Tariff on behalf of the Customer, except in cases of negligence or intentional wrongdoing by the Indemnified Party ~~Independent Transmission Provider.~~

7.3 Limitation of Liability

(a) THE INDEPENDENT TRANSMISSION PROVIDER (WHICH FOR PURPOSES OF THIS SECTION INCLUDES ITS OWNERS, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, CONSULTANTS, ADVISORS, REPRESENTATIVES AND OTHER ENTITIES TO THE EXTENT THAT SUCH OTHER ENTITIES ARE OPERATING FACILITIES OR OTHERWISE PERFORMING FUNCTIONS SUBJECT TO THE DIRECTION OR INSTRUCTION OF THE INDEPENDENT TRANSMISSION PROVIDER) SHALL NOT BE LIABLE TO THE CUSTOMER OR ANY OTHER PARTY FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL, INCIDENTAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING LOST REVENUES, LOSS OF USE OR CAPITAL OR REVENUE, LOSS OF USE OF PROPERTY, LOST PROFITS, COST OF MONEY, OR LOST PROSPECTIVE ECONOMIC ADVANTAGE, UNDER ANY THEORY OF LAW (INCLUDING TORT, CONTRACT, AND STRICT LIABILITY), ARISING FROM ANY ACT OR OMISSION IN ANY WAY ASSOCIATED WITH SERVICE PROVIDED UNDER THIS TARIFF OR ANY PERFORMANCE OR FAILURE TO PERFORM UNDER THIS TARIFF ((WHETHER ARISING OUT OF TRANSMISSION INTERRUPTIONS OR PROBLEMS, ANY INTERRUPTION OF SERVICE OR DEGRADATION OR IMPERFECTION OF SERVICE OR OTHERWISE), EVEN IF THE INDEPENDENT TRANSMISSION PROVIDER KNEW OR SHOULD HAVE KNOWN OF THE POSSIBILITY OR EXISTENCE OF SUCH DAMAGES, AND THE CUSTOMER RELEASES AND WAIVES ANY CLAIMS AGAINST THE INDEPENDENT TRANSMISSION PROVIDER REGARDING SUCH DAMAGES.

(b) Except in cases where the Independent Transmission Provider is determined to have acted with gross negligence or willful misconduct, for any incident in which the Independent Transmission Provider is found to have been liable for any act or omission associated with service provided under the Tariff or for any performance or failure to perform under this Tariff, including but not limited to any act or omission that results in an interruption, deficiency or imperfection of service, the Independent Transmission Provider's liability in the aggregate to all persons affected, at any time, shall be limited to [_____].

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7.4 Survival

The indemnification obligations and limitations on liability set forth in this Section 7 shall survive the termination of this Tariff or any Service Agreement entered into pursuant to this Tariff.

7.5 Interconnection Service

The provisions of this Section 7 shall not apply to service provided under any standard generator interconnection and operating agreement entered into pursuant to the Standard Generator Interconnection Procedures of this Tariff.

*ISO New England***SCHEDULE 1 of Capital Funding Tariff**

- 5.2 Liability:** The ISO shall not be liable for money damages or other compensation to the Customer for actions or omissions by the ISO in performing its obligations under this Capital Funding Tariff or Service Agreement thereunder, provided it has not willfully breached this Capital Funding Tariff or a Service Agreement or engaged in willful misconduct. To the extent the Customer has claims against the ISO, the Customer may only look to the assets of the ISO for the enforcement of such claims and may not seek to enforce any claims against the directors, members, officers, employees or agents of the ISO who, the Customer acknowledges and agrees, have no personal liability for obligations of the ISO by reason of their status as directors, members, officers, employees or agents of the ISO. In no event shall either the ISO or any Customer be liable for any incidental, consequential, multiple or punitive damages, loss of revenues or profits, attorneys fees or costs arising out of, or connected in any way with the performance or nonperformance of this Capital Funding Tariff, any Service Agreement thereunder or the ISO Agreement.
- 5.3 Indemnification:** Each Customer shall at all times indemnify, defend, and save harmless the ISO and its directors, officers, members, employees and agents from any and all damages, losses, claims and liabilities by or to third parties arising out of or resulting from the performance by the ISO under this Capital Funding Tariff or any Service Agreement thereunder, any bankruptcy filings made by a Customer, or the actions or omissions of the Customer in connection with this Capital Funding Tariff or any Service Agreement thereunder, except in cases of gross negligence or willful misconduct by the ISO or its directors, officers, members, employees or agents. The amount of any indemnity payment hereunder shall be reduced (including, without limitation, retroactively) by any insurance proceeds or other amounts actually recovered by the indemnified party in respect of the indemnified action, claim, demand, cost, damage or liability. The obligations of each Customer to indemnify the ISO shall be several, and not joint or joint and several. A Customer's obligation to contribute to any indemnity payment hereunder shall be limited to a percentage thereof equal to the Customer's payments under this Capital Funding Tariff over the twelve (12) calendar months preceding the date of payment divided by the total payments of all Customers under this Capital Funding Tariff over the same period.

New York Independent System Operator, Inc., the Midwest Independent Transmission System Operator, Inc. and PJM Interconnection, L.L.C.

PROPOSED LIABILITY LIMITATION LANGUAGE:

[Parallel language could be included to limit the liability of Transmission Owners.]

Limitation of Liability:

- (a) The Transmission Provider shall not be liable, whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any Transmission Customer, User, or any third party or other person for any damages whatsoever, including, without limitation, direct, incidental, consequential, punitive, special, exemplary or indirect damages arising or resulting from any act or omission in any way associated with service provided under this Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, except to the extent that the Transmission Provider is found liable for gross negligence or intentional or willful misconduct, in which case the Transmission Provider will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages. Nothing in this section, however, is intended to affect obligations otherwise provided in agreements between the Transmission Provider and Transmission Owner.
- (b) The Transmission Provider shall not be liable for damages arising out of services provided under this Tariff, including, but not limited to, any act or omission that results in an interruption, deficiency or imperfection of service, occurring as a result of conditions or circumstances beyond the control of the Transmission Provider or resulting from electric system design common to the domestic electric utility industry or electric system operation practices or conditions common to the domestic electric utility industry.
- (c) As used herein, direct damages shall not include loss of profit, loss of revenue, loss of production, loss of earnings, loss of contract, or any other indirect, special or consequential loss or damage.

*Pacific Northwest Utilities*November 2002
RTO WEST TARIFF PROPOSAL ON**LIABILITY****Definitions**

“Curtailement” means a reduction in scheduled Transmission Services in response to a transmission capacity shortage resulting from adverse system reliability conditions.

“Electric Disturbance” means any sudden, unexpected, changed or abnormal electric condition. An Electric Disturbance may include outages, high or low frequency, abnormal voltage, or oscillations in the Power System. One Electric Disturbance includes all such conditions on all systems directly or indirectly interconnected after an Electric Disturbance originates, until such systems are restored to a stable condition of normal voltage and frequency and are capable of carrying normal load.

“Power System” means a single integrated electric power grid usually characterized by ownership, rental, lease, control or operation by a single person or entity. A “Power System” consists of integrated electric distribution facilities, generating facilities or transmission facilities, or any combination of the three, and includes transmission lines, distribution lines, substations, switching stations, generating plants and all associated equipment for generating, transmitting, distributing or controlling flow of power. The term “Power System” shall include any devices or equipment by which information is originated on an electric system or by the entity operating such system, by which such information is transmitted, and by which such information is received either for information or for operation of the system, whether by the originating system or by another system.

“Party or Parties” means [to be added]

“Direct Damages” means all damages except loss of profit, loss of revenue, loss of production, loss of earnings, loss of contract, or any other indirect, special, punitive, exemplary or consequential loss or damage.

“Replacement Power Cost” means the price at which a Party, acting in a commercially reasonable manner, effects a purchase of comparable electric energy and capacity at the delivery point in place of the electric energy and capacity not delivered. If the Replacement Power Cost cannot be determined, it shall be deemed to be 125% of the applicable Mid-Columbia Dow Jones daily on-peak and off-peak price index, until such time as a published hourly Northwest power price index is established and available.

“Wrongful Dispatch Order” means an operating instruction that, under the applicable RTO West tariffs and agreements, RTO West was not authorized to communicate to a Party or a Scheduling Coordinator.

10. Force Majeure, Indemnification, and Limitations of Liability and Damages

10.1 Force Majeure. An event of Force Majeure means any cause beyond a Party's reasonable control, including without limitation, any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, Curtailment, order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities. A Force Majeure event does not include an act of negligence or intentional wrongdoing. No Party will be considered in default as to any obligation under this Tariff if prevented from fulfilling the obligation due to an event of Force Majeure. However, a Party whose performance under this Tariff is hindered by an event of Force Majeure shall make all reasonable efforts to perform its obligations under this Tariff.

[NOTE: The Filing Utilities are proposing removal of the indemnity section because it does not provide adequate protection for RTO West and Transmission Owners and adds nothing to the proposal previously made by the Filing Utilities]

10.2 Limitation of Liability.

10.2.1 Nothing in this section 10 is intended to affect rights and obligations as between the parties to any agreements to which RTO West is not a party. Nothing in this tariff is intended to waive any defense to liability under any applicable law. Nothing in this tariff is intended to affect any distribution entity's liability or limitations of liability as a distribution company to its own distribution customers.

10.2.2 Except as provided in section 10.3, no Transmission Owner, generation owner or operator, load facility owner or operator, Scheduling Coordinator, power marketer, broker, aggregator or other agent shall be liable, whether based on contract, indemnification, warranty, tort, strict liability or otherwise, to any Transmission Customer, any third party or any other person or entity for any damages whatsoever, including, without limitation, direct, incidental, consequential, punitive, special, exemplary or indirect damages, arising or resulting from an interruption, deficiency or imperfection of service on the Transmission System or service on any directly or indirectly interconnected system caused by an Electric Disturbance, except to the extent that such person or entity is found liable for gross negligence or intentional misconduct, in which case no such liability shall exist for any incidental, consequential, punitive, special, exemplary or indirect damages.

10.2.3 Except as provided in section 10.3, RTO West shall not be liable, whether based on contract, indemnification, warranty, tort,

strict liability or otherwise, to any Transmission Customer, any third party or other person or entity for any damages whatsoever, including, without limitation, direct, incidental, consequential, punitive, special, exemplary or indirect damages arising or resulting from an interruption, deficiency or imperfection of service on the Transmission System or service on any directly or indirectly interconnected system caused by an Electric Disturbance, except to the extent that RTO West is found liable for gross negligence or intentional misconduct, in which case RTO West will not be liable for any incidental, consequential, punitive, special, exemplary or indirect damages.

10.2.4 No Party shall be liable for damages arising or resulting from an interruption, deficiency or imperfection of service on the Transmission System or service on any directly or indirectly interconnected system caused by an Electric Disturbance, resulting from electric system design common to the national or regional electric utility, industry or Power System operation practices or conditions common to the national or regional electric utility industry.

10.2.5 No Party shall be liable for damages arising or resulting from an interruption, deficiency or imperfection of service on the Transmission System or service on any directly or indirectly interconnected system caused by an Electric Disturbance resulting from acts or omissions in compliance with a directive from RTO West.

10.2.6 No Transmission Owner or distribution entity shall be liable for claims by or on behalf of distribution customers of any other Transmission Owner or distribution entity for damages arising or resulting from an interruption, deficiency or imperfection of service on the RTO West Transmission System or service on any directly or indirectly interconnected system caused by an Electric Disturbance.

10.3 Limitation on Direct Damages.

10.3.1 For each incident in which a Transmission Owner, generation owner or operator, load facility owner or operator, Scheduling Coordinator, aggregator or other agent is found liable for damages resulting from an interruption, deficiency or imperfection of service on the Transmission System or service on any directly or indirectly interconnected system caused by an Electric Disturbance, such entity's liability in total to all persons or entities so affected shall be limited to Direct Damages in an amount not to exceed the greater of \$500,000 or, in the case of a Transmission Owner, in an amount determined by multiplying 0.0025 by the Transmission Owner's annualized Company Costs, except to the extent that such entity is found liable for gross negligence or intentional

misconduct, in which case the preceding limits Direct Damages shall not apply.

10.3.2 For each incident in which RTO West is found liable for damages resulting from an interruption, deficiency or imperfection of service on the Transmission System or service on any directly or indirectly interconnected system caused by an Electric Disturbance, the RTO West's liability in total to all persons or entities so affected shall be limited to Direct Damages, but in an amount not to exceed \$5,000,000, except to the extent that RTO West is found liable for gross negligence or intentional misconduct, in which case the preceding limits on Direct Damages shall not apply.

10.4 Liability for Wrongful Dispatch Orders.

10.4.1 This section shall apply to claims by a Party against RTO West for damages arising from a Wrongful Dispatch Order issued by RTO West.

10.4.2 In the event RTO West issues a Wrongful Dispatch Order to a Party or a Scheduling Coordinator, then in such event:

10.4.2.1 No provision of this Tariff shall be construed as requiring any Party to follow such operating instruction; and

10.4.2.2 If a Party complies, or attempts to comply, with such a Wrongful Dispatch Order and such Party incurs loss or damage as a result, then in such a case such Party shall be entitled to recover from RTO West only as follows, depending on the nature of the affected transaction:

10.4.2.2.1 Where a sale schedule has been interrupted by RTO West and the damaged Party is a purchaser purchasing for its own load, the damage Party may recover the amount by which the Replacement Power Cost (actually purchased or for which liquidated damages are paid) exceeds the price at which the purchase transactions sale would have occurred absent the Wrongful Dispatch Order, less any liquidated damages paid to the damaged Party by a third person or entity.

10.4.2.2.2 Where a generator specific sale schedule has been interrupted by RTO West and the damaged Party is selling power into the market, the damaged Party may recover the amount by which Replacement Power Cost exceeds the fuel and variable operation, and maintenance cost and a reasonable allocation of the overhead, depreciation and fixed costs allocable to the generation of electric energy of such

generator, plus any liquidated damages that the damaged Party is legally obligated to pay as a result of the schedule interruption less any liquidated damages paid to the damaged Party by a third person or entity.

10.4.2.2.3 Where a generator specific sale is from a seller generating its own generation, the damage Party may recover the amount of margin lost by such Party, measured as the difference between the original sale price and the price the seller actually obtained for resale of the interrupted capacity and energy, or absent resale, measured as the original sales price less the fuel and variable operation, and maintenance cost not incurred by such Party, provided that such Party makes reasonable efforts to resell such capacity and energy.

10.4.2.2.4 Where a sale schedule is interrupted by RTO West and the damaged Party is a purchaser that has resold the purchased generation at wholesale, the damaged Party may recover either (1) the amount by which Replacement Power Cost exceeds the interrupted original purchase cost, plus any liquidated damages that the damaged Party is legally obligated to pay as a result of the schedule interruption, less any liquidated damages paid to the damaged Party by a third person or entity; or (2) the margin between the original purchase and original sale as reduced after the contract remedies of the original purchase and original sale are applied.

10.4.2.2.5 Where a sale schedule has not been interrupted by RTO West, but the damaged Party is a generating Party selling its own generation, which Party was prevented from making a sale as a direct result of a Wrongful Dispatch Order, the damaged Party may recover an amount equal to the quantity of electric energy that would have been sold priced at 125% of the applicable Mid-Columbia Dow Jones daily on-peak or off-peak index price (until such time as a published hourly Northwest power price index is established and available), or such other applicable index as agreed by the Parties, less the fuel and variable operation and maintenance costs and a reasonable allocation of overhead, depreciation and fixed costs allocable to the generation of electric energy which would have been incurred had the sale occurred.

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10.4.2.3 With respect to claims made under section 10.4.2.2, a claiming Party shall provide reasonable justification to support its claim.

10.4.3 The amounts recoverable under section 10.4.2.2 are a reasonable estimate of loss and not a penalty, and represent the sole and exclusive remedy against RTO West for a Wrongful Dispatch Order.