

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

Tri-State Generation and Transmission Association, Inc.,)	
Complainant,)	
)	
v.)	Docket Nos. EL13-11-000
)	RD13-1-000
)	
Western Electricity Coordinating Council and North American Electric Reliability Corporation,)	
Respondent)	

MOTION FOR LEAVE TO ANSWER AND ANSWER OF THE WESTERN ELECTRICITY COORDINATING COUNCIL AND NORTH AMERICAN ELECTRIC RELIABILITY CORPORATION TO ANSWER OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission” or “FERC”),¹ the Western Electricity Coordinating Council (“WECC”) and the North American Electric Reliability Corporation (“NERC”) submit this Answer to the November 21, 2012 answer filed in the above-referenced docket by Tri-State Generation and Transmission Association, Inc. (“Tri-State”). As noted in WECC and NERC’s November 8, 2012 Answer (“November 8 Answer”), Tri-State’s requested relief cannot be granted because its Complaint is jurisdictionally and procedurally flawed. Moreover, WECC and NERC are working as quickly as possible within their approved processes to file revised documents for FERC approval within the first quarter of 2013.²

¹ 18 C.F.R. §§ 385.212 & 385.213 (2012).
² This is a target timeframe, which depends on successful completion of WECC and NERC’s procedures to ensure adequate industry review and public comment.

I. MOTION FOR LEAVE TO ANSWER

Although the Commission's procedural rules generally do not provide for answers to protests, answers, or similar filings unless otherwise ordered,³ the Commission may, for good cause shown, permit such answer.⁴ The instant answer will assist the Commission with resolution of the issues presented by providing a complete and accurate record, and by clarifying certain issues raised by Tri-State. Accordingly, WECC and NERC respectfully request that the Commission accept this Answer.

II. ANSWER

The core mission of WECC and NERC is to promote and ensure the reliable operation of the bulk power system. As part of that mission, WECC and NERC follow established procedures to ensure due process. Tri-State's request that the Commission order WECC and NERC to circumvent those established procedures to implement policies (1) in a manner that is inconsistent with an existing reliability standard and (2) prior to the Commission's review of the revised UFMP does not promote or ensure reliability.⁵

The Commission should dismiss Tri-State's complaint and allow WECC and NERC to continue their efforts to revise the IRO-006-WECC-1 reliability standard and WECC's Unscheduled Flow Mitigation Plan ("UFMP") in conjunction with one another and in accordance with the FERC-required process that is already well underway. Prompt dismissal of the

³ 18 C.F.R. § 385.213(a)(2).

⁴ *Id.* § 385.101(e).

⁵ WECC and NERC are indeed concerned with unscheduled flow ("USF"), and WECC has already assigned the task of studying the root causes of the apparent increase in USF to a WECC subcommittee. As more fully discussed in WECC and NERC's November 8 Answer, the UFMP currently provides a two prong approach to mitigating the impacts of USF. First, the UFMP promotes the installation of specific equipment to help control USF in the Western Interconnection. Second, the UFMP includes a curtailment procedure to mitigate the impact of USF on qualified transfer paths. The UFMP, however, does not reduce USF, it merely provides a plan to manage USF by sharing the impacts between those transmission systems affected by USF and those transmission systems contributing to USF.

complaint will facilitate the quickest resolution of Tri-State's concerns, while Tri-State's continued pursuit of this complaint serves only to delay the current process.

A. Tri-State's Legal Analysis Fails to Provide a Logical Interpretation of Statutory Language, Commission Regulation Language and Commission Precedent and Should be Rejected by the Commission

Tri-State has not successfully rebutted WECC and NERC's demonstration that: (1) Tri-State's complaint is inappropriate under Federal Power Act ("FPA") Section 206 because WECC and NERC are not public utilities; (2) Tri-State's complaint is inappropriate under FPA Section 215 because Tri-State is not a "Transmission Organization"; and (3) there is no conflict between the UFMP and the *pro forma* Open Access Transmission Tariff ("OATT").

1. Tri-State's Complaint is Inappropriate under FPA Section 206 because WECC and NERC Are Not Public Utilities

It is well-established that Section 206 of the FPA applies only to public utilities.⁶ Tri-State's attempt to read the words "public utility" out of the statutory language,⁷ and its strained interpretation of the phrase "any rule, regulation, practice, or contract affecting such rate, charge, or classification,"⁸ does not support the expansion of the jurisdictional limitations of Section 206 beyond public utilities. As explained in more detail in the November 8 Answer, WECC and NERC are not public utilities because they do not own or operate facilities subject to the Commission's jurisdiction.⁹ Further, Tri-State's reading of Section 206 would permit the filing

⁶ See, e.g., *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 918 (9th Cir. 2005), *cert. denied*, 128 S. Ct. 804 (2007) ("FERC's rate jurisdiction under § 205 and its refund jurisdiction under § 206 expressly apply *only* to public utilities.") (emphasis added).

⁷ See, e.g., Tri-State Answer at 4 (stating that "WECC's implementation...constitutes a practice affecting the 'rate, charge, or classification, demanded, observed, charged, or collected by' public utilities," failing to include within quotation marks the critical words "public utilities").

⁸ See, e.g., Tri-State Answer at 5 (ignoring Section 206's use of the word "*such* rate..." that serves to limit the applicability of Section 206 to any rule, regulation, practice, or contract affecting a *public utility's* rate, charge, or classification, and instead arguing that Section 206 applies to "'any' rule, regulation, practice, or contract affecting transmission, regardless of which entity administers such rule, regulation, practice or contract.>").

⁹ WECC and NERC November 8 Answer at 9-10.

of complaints against non-public utilities under that provision, and such a reading cannot be reconciled with FERC's history of rejecting such complaints.

Further, Tri-State's analysis of the 1998 Commission order approving the Transmission Loading Relief ("TLR") procedures applicable in the Eastern Interconnection reveals a fundamental misunderstanding of the significance of WECC or NERC filing a procedure as a rate schedule *on behalf of* member public utilities. In particular, the 1998 TLR order found that all Eastern Interconnection transmission-operating public utilities employing the TLR procedures must either: (1) file a notice informing the Commission that it uses the procedures and, therefore, that its *pro forma* tariff should be modified to reflect the NERC-proposed generic tariff amendment incorporating the procedures; or (2) make a separate filing proposing to incorporate its own procedures for addressing parallel flows into its *pro forma* tariff and demonstrate that its procedures are consistent with or superior to the *pro forma* tariff.¹⁰ Similarly, WECC has filed, and is currently preparing to file again, the UFMP under FPA Section 205 on behalf of its members, and all Western Interconnection transmission providers have incorporated the UFMP into their FERC-approved OATTs. Thus, in both cases, the relevant procedures are on file with the Commission for transmission-operating public utilities that provide transmission services under rates, terms and conditions set forth in an OATT on file with the Commission, not with the Commission for WECC or NERC (who do not provide transmission service under an OATT). This important distinction means that the UFMP is indeed subject to Commission scrutiny under the FPA, but neither WECC nor NERC is an appropriate respondent for a Section 206 complaint involving that procedure.

¹⁰ *N. Am. Elec. Reliability Council*, 85 FERC ¶ 61,353 at 13 (1998).

2. Tri-State's Complaint is Inappropriate under FPA Section 215(d)(6) Because Tri-State is Not a Transmission Organization

As with its Section 206 analysis, Tri-State selectively quotes from FPA Section 215(d)(6),¹¹ Section 39.6 of the Commission's regulations, and Order No. 672¹² in an attempt to broaden the scope of applicability beyond that intended by the Commission.

For instance, Tri-State states that the following requirements under Section 39.6(a) of the Commission's regulations merely "*appear* to provide only for 'Transmission Organizations' to submit notice of a conflict," but that nothing in this language precludes non-Transmission Organizations from raising conflict issues to the Commission:

If a user, owner or operator of the transmission facilities of a Transmission Organization determines that a Reliability Standard may conflict with a function, rule, order, tariff, rate schedule, or agreement accepted, approved, or ordered by the Commission with respect to such Transmission Organization, the Transmission Organization shall expeditiously notify the Commission, the Electric Reliability Organization and the relevant Regional Entity of the possible conflict.¹³

¹¹ Tri-State Answer at 7 (emphasizing the Section 215(d)(6) passage "upon its own motion or upon complaint" in order to argue that "upon complaint" means that any entity can file a Section 215 complaint, ignoring that single passage's relationship to the remainder of the Section 215(d)(6) language and Section 39.6 of the Commission's regulations that make it clear that a Transmission Organization must file such a complaint).

¹² Tri-State Answer at 9-12 (reviewing passages from Order Nos. 672 and 672-A that do not appear to support Tri-State's claims, as well as highlighting non-relevant words in critical passages in order to attempt to change the meaning of such passages, such as highlighting the word "must" in the following underlined sentence from paragraph 41 of Order No. 672-A in an apparent attempt to distract from the logical conclusion that the Commission intended to convey in that paragraph that, while any user, owner or operator may identify potential conflicts, Transmission Organizations, and only Transmission Organizations, may file (on that user, owner or operator's behalf, as applicable) under Section 215:

"[W]e encourage any user, owner or operator that identifies a potential conflict between a Transmission Organization tariff and a Reliability Standard to consult with the Transmission Organization regarding the potential conflict. If the matter is not resolved informally, the Transmission Organization **must** expeditiously notify the Commission of the potential conflict. Further, we encourage the Transmission Organization to submit its own comments on the issue when it notifies the Commission, provided that the preparation of Transmission Organization comments causes no delay in notifying the Commission. The Transmission Organization may provide additional comments on the potential conflict during the notice and comment period on the matter. However, there is no need to revise our regulations to incorporate this level of detail."

¹³ See Tri-State Answer at 8 (emphasis added); 18 C.F.R. § 39.6(a) (emphasis added).

Tri-State reasons that the Commission intended with this language to place “the ultimate, but not sole, responsibility” for notifying the Commission on the Transmission Organization.¹⁴ Such an interpretation violates the fundamental rule of statutory construction, *expressio unius est exclusio alterius*, or the express mention of one thing implies the exclusion of another. Applied here, mention of the specific – *i.e.*, a Transmission Organization must file notice with the Commission – cannot be read to mean that the Commission also intended to include a broader application – *i.e.*, non-Transmission Organizations can also file notice. WECC and NERC do not deny that any user, owner or operator may *identify* potential conflicts, but it is clear that the Commission intended that Transmission Organizations, and only Transmission Organizations, may file (on that user, owner or operator’s behalf, as applicable) notice of such conflicts with the Commission under Section 215(d). Tri-State’s interpretation is also contrary to the Commission’s discussion of this provision in Order No. 672.¹⁵

As discussed in the November 8 Answer,¹⁶ there are other procedural avenues available beyond Section 215(d). As one example, users, owners and operators may file a complaint with the Commission under Section 206 raising allegations that a specific public utility transmission provider has violated the terms and conditions in its OATT.¹⁷ This is a more appropriate process for a number of reasons, most notably, it provides factual context into a specific transmission provider’s operations and interpretation of its OATT.

On a related note, Powerex Corporation’s (“Powerex”) concerns that WECC and NERC’s interpretation of FPA Sections 206 and 215 could restrict the rights of transmission customers or

¹⁴ Tri-State Answer at 9.

¹⁵ WECC and NERC November 8 Answer at 12-13.

¹⁶ WECC and NERC November 8 Answer at 13.

¹⁷ With regard to the second issue raised on pages 8-9 of Powerex’s response, WECC and NERC agree that the issue of untagged flows and their impact on firm transmission raised by Xcel is outside the scope of the instant complaint proceeding.

other entities outside of Regional Transmission Organization (“RTO”) or Independent System Operator (“ISO”) regions to raise with the Commission conflicts between reliability standards and the *pro forma* OATT is misplaced.¹⁸ WECC and NERC did not intend to suggest that the definition of “Transmission Organization” is too narrow to include those organizations with FERC-approved OATTs outside of RTO or ISO regions.

Finally, Tri-State cannot attempt to rehabilitate its flawed pleading by pointing to intervenors with Transmission Organization status. That is, contrary to Tri-State’s claims,¹⁹ Xcel Energy Services Inc.’s motion to intervene and comments filed in this proceeding do not constitute a “complaint” under Section 215(d). Rather, Xcel’s motion to intervene and comments do nothing more than express Xcel’s support for Tri-State’s allegations. However, Xcel has not provided any additional factual support regarding its inability to comply with both its OATT and the current version of IRO-006-WECC-1. Instead, Xcel merely restates Tri-State’s flawed interpretation of Order Nos. 888 and 890, as discussed in Section II.A.3 herein below.

3. There Is No Conflict Between the UFMP and the *Pro Forma* OATT

As noted above, Tri-State cited to the Commission’s 1998 order approving the TLR procedures applicable in the Eastern Interconnection as support for its argument that the Commission has jurisdiction over WECC and NERC under FPA Section 206.²⁰ Not only is that argument misplaced, as discussed in detail in Section II.A.1 above, but Tri-State failed to note that the Commission’s finding in that same order directly contradicts the core argument in Tri-State’s Complaint. In particular, the Commission stated that:

¹⁸ *Tri-State Generation and Transmission Association, Inc. v. WECC and NERC*, Docket Nos. EL13-11-000 and RD13-1-000, Powerex Corp. Motion for Leave to Respond and Response at 3-8, dated Nov. 21, 2012.

¹⁹ Tri-State Answer at 11-12.

²⁰ Tri-State Answer at 5-6.

The *pro forma* [OATT] does not contain protocols for curtailment in multi-system transactions or in the case of parallel flows. The issues which are the central focus of NERC's petition and NERC's proposed TLR procedures are those of curtailment in a multi-system transaction and parallel flows. As we discuss below, the Commission concludes that, while imperfect, NERC's proposed TLR procedures – which address multi-system transactions and parallel flows – are generally consistent with or superior to the *pro forma* tariff with respect to these issues.²¹

The Commission's holding makes it clear that there is no conflict between the UFMP and the *pro forma* OATT because addressing USF impacts across multiple transmission systems is outside the scope of the *pro forma* OATT. The OATT establishes the terms and conditions of transmission service between transmission provider and transmission customer, not between transmission providers.²² USF impacts between paths on a single transmission system can be addressed by the transmission provider pursuant to the terms and conditions of its OATT. Impacts between transmission systems, however, require a multi-system approach, such as the TLR in the Eastern Interconnection and the UFMP in the Western Interconnection. Therefore, Tri-State's argument of a conflict between IRO-006-WECC-1 and the *pro forma* OATT is based on the false presumption that the *pro forma* OATT addresses multi-system USF impacts.

B. WECC and NERC Continue to Follow FERC-Approved Processes and Aim to File Revised Documents by the First Quarter of 2013

As noted above and as described in more detail in WECC and NERC's November 8 Answer, the Commission should dismiss Tri-State's complaint and allow WECC and NERC to

²¹ *N. Am. Elec. Reliability Council*, 85 FERC ¶ 61,353 at 12 (1998).

²² *See generally Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), 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), *aff'd sub nom., New York v. FERC*, 535 U.S. 1 (2002); and *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (March 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007); *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (January 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

revise the IRO-006-WECC-1 reliability standard and UFMP in conjunction with one another and in accordance with the FERC-required process that is already well underway.²³ Anything other than a dismissal of Tri-State’s complaint will not, as Tri-State claims, remedy its alleged issues “more expeditiously,”²⁴ and instead would likely delay implementation further by derailing the current process that is almost complete and will satisfy Tri-State’s concerns in the quickest possible manner. Tri-State has participated in the WECC and NERC process so far and should not be allowed to end-run the remaining regulatory requirements through its complaint.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, WECC and NERC request that the Commission grant the instant request for leave to answer and dismiss Tri-State’s complaint without condition or hearing.

²³ WECC and NERC November 8 Answer at 24-28.

²⁴ Tri-State Answer at 20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of December, 2012, electronically served the foregoing document on the official service list in this proceeding.

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