Federal Energy Regulatory Commission
May 18, 2006 Commission Meeting
Statement of
Chairman Joseph T. Kelliher

E-1: Open Access Transmission Tariff (OATT) Reform (RM05-25-000)

"Today, the Commission begins a major rulemaking proceeding that has one primary goal in mind: preventing undue discrimination and preference in transmission service.

The Commission has concluded the open access rules it established ten years ago allow an opportunity for undue discrimination and preference in transmission service. The way the Federal Power Act operates, when we make a finding of undue discrimination and preference, we are required to act to prevent it, we have to act, we have to do something. We cannot let undue discrimination and preference remain undisturbed. We have discretion on our choice of means, however.

This is actually the third time the Commission has found our open access rules permit undue discrimination and preference in transmission service. This is only the first time the Commission is proposing to focus the reform effort on the OATT, however. The first time the Commission found Order No. 888 allowed undue discrimination and preference in transmission service occurred in 1999. The solution advanced by the Commission was restructuring: encouraging voluntary RTO formation, in Order No. 2000.

The second time the Commission found Order No. 888 allowed undue discrimination and preference took place in 2002. The solution advanced by the Commission at the time was also restructuring, this time mandating RTO participation and a standard market design.

The solution we advance today is not restructuring, but more effective regulation, reform of the open access rules themselves, for the first time in nearly a decade.

We are not forcing utilities to divest transmission, we are not forcing utilities to join RTOs and surrender control of transmission assets; instead, we are tightening up our open access rules to prevent undue discrimination and preference.

We have been deliberate in our approach. This process actually began in December 2004, when the Commission held a transmission market power conference. At that conference, I asked the panelists whether they believed Order No. 888 prevented undue discrimination and preference in transmission service. All but one panelist responded in the negative. This proceeding formally began last September, when we issued a Notice of Inquiry posing a host of questions relating to operation of our open access rules. Significantly, this was one of our first initiatives the Commission took unrelated to implementation of the Energy Policy Act of 2005. The record of this proceeding is substantial, exceeding 5,000 pages.

We are on strong legal ground with this initiative. The rulemaking is based on our authority under section 206 of the Federal Power Act, and the courts have recognized we have broad remedial authority to prevent undue discrimination and preference.

We have worked closely with stakeholders, state regulators, transmission owners, and transmission customers, including municipal utilities, rural electric cooperatives, and generators. We have received a lot of good advice and suggestions, which are reflected in the proposed rules. The proposed rules should not come as a surprise to those who have participated in our deliberations leading up to this point. Our proposals are rooted in the record, and solidly grounded in our strongest legal authority.

We recognize the need for regional differences. Indeed, the planning provisions of the proposed rules

are modeled, in part, on some of the planning processes that are currently being used in several regions. For example, the West has steadily developed more open and transparent planning processes and the Southeast is beginning to make strides in this area as well. Our proposed planning reforms seek to build on and strengthen some of the processes that exist today.

The transmission planning provisions of the proposed rules reflect a view that transmission planning should reflect the needs of not only the native load customers of the transmission owner, but its transmission customers. The planning provisions also recognize the reality that wholesale power markets are regional in nature. They are not national in scope, and in most cases not neatly confined within state boundaries. If the market is regional, then grid planning should also be regional in nature, and we also recognize that some planning is better performed on a sub-regional basis.

I want to distinguish transmission planning from implementation of those plans, from actual investment. While we require a jurisdictional transmission owner to adopt an open, inclusive and transparent planning process, one that reflects the needs not only of the transmission owner and its native load customers, but also the needs of transmission customers we do not impose any new obligation to build. Rather, our reforms are intended to ensure that the existing obligation to build – to satisfy specific requests for service and to treat network customers comparably to native load – are both meaningful and enforceable.

I want to make very clear, however, that nothing in our proposed planning reforms is intended to supplant state jurisdiction. Rather, I believe that they will provide greater information as to the range of transmission investment needs and options – information upon which states can exercise their historic role in ensuring resource adequacy, including performing integrated resource planning.

The proposed rules do not represent a change in Commission policy towards RTOs. We continue to support voluntary RTO formation. Our proposed rules do not push utilities into RTOs, and the reformed open access rules would apply to all jurisdictional utilities, both within RTOs and without, as well as the RTOs themselves.

We have taken a balanced approach. One hallmark of extensive comments we received in response to the Notice of Inquiry was to keep Order No. 888, to strengthen Order No. 888, to build on Order No. 888. That is exactly what we propose to do. Our proposed rules preserve the native load protection, preserve state jurisdiction over bundled retail sales, preserve the comparability requirement, preserve reciprocity, and preserve functional unbundling.

We strengthen Order No. 888 by providing for greater consistency in calculation of available transfer capability, which is integral to defining the amount of transmission capacity that must be made available for third parties. We strengthen Order No. 888 by providing for open, coordinated, and transparent transmission planning. We strengthen Order No. 888 by providing for increased transparency and customer access to transmission information.

The ambiguities in our current open access rules frustrate the Commission, transmission customers, and the utilities themselves. The rules frustrate the Commission because it makes it much harder for us to identify violations and prove undue discrimination and preference. The current rules frustrate transmission customers because when they are denied access and denied transmission service since the cause of the denial is often mysterious and elusive; they suspect abuse. The current rules frustrate utilities because they are sometimes unable to demonstrate compliance.

Our primary goal is preventing undue discrimination and preference, but open access reform will also promote wholesale competition, but providing more reasonable and more certain access to the grid, the interstate highway for wholesale power markets.

Open access reform will also strengthen the grid, through planning reforms. As I noted, we are not imposing a new obligation to build transmission, we are imposing an obligation to implement improved transmission planning. Our hope is that more open, coordinated, and transparent planning will promote increased transmission investments.

I consider our actions today to be fully consistent with the policy direction of the Energy Policy Act of 2005, and complements the reforms Congress undertook last year, and that we have spent much of the last few months implementing. The Energy Policy Act promoted strengthening the transmission grid, providing open access to the grid, and encouraging wholesale competition. Open access reform accomplishes these goals.

Reforming our open access rules is my top personal priority as Chairman. In recent years, we have steadily reformed our generation policies, through changes to the generation market power tests. We take another step in that direction today.

In my view, regulators have a duty to reform rules when they reach a conclusion, after due deliberation, that those rules are inadequate. That is exactly what we are doing today.

I normally do not speak for my colleagues, but I think the views I express today reflect a common vision, a shared vision, and a shared sense of responsibility. I thank my colleagues for working on these important reforms with me in such a collegial spirit. These proposed rules represent the best judgment of all three of us.

I must admit to be somewhat surprised by the speed with which we are acting today. That was only possible due to two factors. First, the collegiality and sense of responsibility of the current Commission. For that, I praise and thank my colleagues. Second, the current the truly outstanding work of the staff who worked on the OATT Reform Team. The team was a perfect blend of veteran staff who worked on the original Open Access Transmission Tariff, and new talent the Commission has been fortunate to acquire in recent years and months. I offer my sincere praise and thanks to the team.

Today we are taking only the first step in the process. We ask for public comment on the proposed rules, and we will hold a technical conference on the proposed rules. A final rule is months down the road."