

## BOOK REVIEW

888 ANNOTATED USER'S GUIDE TO THE FEDERAL ENERGY REGULATORY COMMISSION'S OPEN ACCESS TARIFF by Donald R. Allen. (Donald R. Allen, 1998, 1999.)

Reviewed by  
*Howard E. Shapiro\**

The Federal Energy Regulatory Commission's (FERC or Commission) Order No. 888<sup>1</sup> and its companion Order No. 889<sup>2</sup> established the regulatory basis for competitive wholesale power markets. As most readers know, Order No. 888 required public utilities subject to the Federal Power Act that own or operate transmission systems to file nondiscriminatory open access transmission tariffs (OATT) setting forth prescribed non-price terms and conditions. It also required the functional unbundling of wholesale power services from transmission services. In addition, it directed each public utility to take transmission service under its OATT like other users, to state separate rates for wholesale generation transmission and ancillary services, and to use the same electronic information network as its customers.

Under Order No. 889, utilities were required to participate in an Open Access Same-Time Information System (OASIS) that meets specified standards and to comply with prescribed Standards of Conduct designed to assure separation of wholesale power merchant functions from transmission functions. In a remarkable understatement, the Commission has stated that "Order Nos. 888 and 889 required a significant change in the way many public utilities have done business for most of this century. . . ."<sup>3</sup>

In the four years since these orders were issued, energy practitioners, utility managers, rate specialists, experts, and consultants have pondered the Orders' preambles, accompanying regulations, and, in particular, the detailed provisions of Order No. 888's *pro forma* tariff. The wave of Commission orders in the Open Access (OA) dockets that accompanied the initial filings, and the subsequent orders that have fleshed out the Commission's policies, have generated a vast and cumbersome jurisprudence. Even in this age of electronic research, keeping track of it all has seemed an almost insurmountable problem. Most of those who must keep track have relied on groping recollections, a usually tattered version of the basic orders and the OATT, LEXIS research, and the indispensable assistance of paralegals.

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\* Howard E. Shapiro (L.L.B. Columbia University, 1955; B.S. University of Illinois, 1952) practices energy, antitrust, and environmental law with Van Ness Feldman, a Washington, D.C., law firm.

1. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *order on reh'g*, Order No. 888-A, III F.E.R.C. STATS. & REGS. ¶ 31,048, 62 Fed. Reg. 12,274 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *petitions for review pending sub nom. Transmission Access Policy Study Group v. FERC*, Nos. 97-1715, *et al.* (D.C. Cir. argued Nov. 3, 1999).

2. Order No. 889, *Open Access Same-Time Information System (Formerly Real-Time Information Networks) and Standards of Conduct*, F.E.R.C. STATS. & REGS. ¶ 31,035, 61 Fed. Reg. 21,737 (1996), *order on reh'g*, Order No. 889-A, III F.E.R.C. STATS. & REGS. ¶ 31,049, 61 Fed. Reg. 12,484 (1997), *order on reh'g*, Order No. 889-B, 81 F.E.R.C. ¶ 61,253 (1997).

3. Order No. 2000, *Regional Transmission Organizations*, F.E.R.C. STATS. & REGS. ¶ 31,089, 30,996, 65 Fed. Reg. 809 (2000).

Don Allen began keeping track of the decisions under the OATT by noting references in the FERC's decisions under each particular section of the OATT being interpreted. His initial notes have grown into his *Annotated User's Guide to the Open Access Tariff* (the *Guide*). Originally published in 1998, the *Guide* was updated in 1999.

In format, the *Guide* is a large three-ring notebook in which each article and section of the OATT is tabbed. The text of the OATT is set forth in Ariel type face. Citations to the relevant decisions are likewise set forth in Ariel. Extracts from the decisions appear below each section in Times New Roman type face. In addition to addressing the articles, sections, schedules, and attachments to the OATT, the *Guide* includes a section of miscellaneous annotations. These address four categories of decisions: General Interpretations; Failure to Enforce and Comply with the Tariffs; Transition Considerations; and References to State Restructuring and Retail Open Access Programs.

The three-ring binder format enables users to keep current by inserting notes and extracts from decisions at the tab for each particular section interpreted. The *Guide* thus provides a convenient framework for systematically collecting and annotating the tariff between the supplements proposed to be issued annually. Unfortunately, annual supplements seem too infrequent. Each FERC agenda produces a new spate of orders addressing issues under the OATT. The user who diligently sorts through these orders and notes or inserts them under the appropriate sections of the *Guide* will soon have a very ragged compilation, and a great deal of paper to manage. The FERC's decisions interpreting the OATT usually cover numerous issues. Thus, portions of the same decisions frequently must be annotated under different sections of the tariff, or in the Miscellaneous Annotations.

This raises some difficult problems of choice as to which portions of the FERC's decisions to insert where. The burden of choice can result in troublesome omissions. For example, in *Northern States Power Company v. FERC*,<sup>4</sup> the Eighth Circuit ruled that the FERC lacks jurisdiction to regulate curtailment of power to a jurisdictional utility's native retail customers. The FERC's underlying orders addressed a number of issues concerning curtailment.<sup>5</sup> The crucial determination at issue before the Court of Appeals was the FERC's decision that the utility could not prefer its native load when curtailing firm point-to-point transmission under the *pro forma* tariff. Although the *Guide* notes other aspects of the underlying orders, and provides a "see" reference to the Eighth Circuit's decision, this significant determination was not annotated. It undoubtedly will be covered in the next supplement, because the Commission has issued an order on remand narrowly construing the Court of Appeals' decision, and the utility

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4. *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *cert. denied sub nom. Enron Power Mktg., Inc. v. Northern States Power Co.*, 120 S.Ct. 1221 (2000). *See also* William H. Penniman & Paul B. Turner, *A Jurisdictional Clash Over Electricity Transmission: Northern States Power v. FERC*, 20 ENERGY L.J. 205 (1999).

5. *Northern States Power Co.*, 83 F.E.R.C. ¶ 61,098; *order on clarification*, 83 F.E.R.C. ¶ 61,338; *order denying request for clarification, reh'g. and stay*, 84 F.E.R.C. ¶ 61,128 (1998).

has subsequently withdrawn the tariff amendment which originated the dispute.<sup>6</sup>

The difficulty of assigning decisions like the *Northern States Power* case under particular sections of the OATT indicates that more than an annotation of decisions under the OATT is necessary in order to effectively deal with Order No. 888. A complete library would include an annotated version of the preambles to Orders No. 888 and 889 as well as annotations under the OATT itself. Until that very large project can be carried out, Don Allen's *Guide*, viewed as a work in progress subject to revision and expansion, is a useful tool for keeping track of developments under the OATT.

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6. *Northern States Power Co.*, 89 F.E.R.C. ¶ 61,178; *order accepting withdrawal of proposal*, 89 F.E.R.C. ¶ 61,299 (1999).

