

EPACT'05 IMPLEMENTATION: IS FERC IN FULL COMPLIANCE?

*Jay Morrison*¹

Synopsis: In the Energy Policy Act of 2005 (EPAct'05), Congress adopted new Federal Power Act (FPA) section 217(b)(4). That provision directs the Federal Energy Regulatory Commission (“Commission”) to use all of its authority under the FPA to accomplish a specific Congressional goal, in short, to enable load-serving entities (LSEs) to obtain the long-term transmission service they need to meet their long-term obligations to their electric consumers. In the two years since enactment of the EPAct'05, the Commission has issued more than a dozen major policy orders pursuant to its authority under the FPA, only two of which expressly reference the new Congressional directive. While the Commission has taken some major steps to enhance transmission access for all transmission customers, including LSEs, it has not embraced or fully implemented the new vision Congress codified in the EPAct'05. To do so, the Commission should reconsider some elements of its recent policy orders and should adopt an express review process to ensure that section 217(b)(4) is properly considered and implemented in the future.

I. Introduction	632
A. Background	632
B. Section 217(b)(4).....	634
1. The Goals of Section 217(b)(4)	635
a. Load Serving Entity.....	635
b. Long-Term	636
c. Transmission Planning and Expansion.....	638
2. How Far Can and Should the Commission Go to Pursue Section 217(b)(4)'s Goals?	639
II. Discussion	641
A. Opportunities to Implement New Directions Since the EPAct'05	641
B. 2006 Strategic Plan and Annual Report	642
C. OATT Reform (Order No. 890)	644
1. Transmission Planning	644
2. Expansion.....	646
3. LSEs.....	647
4. Long-term	649
D. LTTR Final Rule	650
E. Transmission Incentives	654
1. Transmission Planning	655
2. LSEs.....	657

1. Jay Morrison is Senior Regulatory Counsel at the National Rural Electric Cooperative Association, the national trade organization representing the nation's 930 consumer-owned, consumer-governed not-for-profit electric utilities. The author thanks his colleagues at the NRECA for their assistance on this article. Nevertheless, all opinions and errors in this article are the author's own and do not necessarily reflect the views of the NRECA or its members.

F. Market-Based Rates	658
G. Transmission Siting Final Rule (Order No. 689)	661
III. Conclusion and Recommendations	664

I. INTRODUCTION

On August 14, 2005, the President signed into law the most significant new statement of federal energy policy at least since the Energy Policy Act of 1992.² While the new statute, the Energy Policy Act of 2005,³ filled more than 1200 pages and covered nearly every aspect of the energy sector, it is particularly notable for a single obscure provision buried in its Electricity Title creating a new subsection of the Federal Power Act (FPA) section 217(b)(4).⁴ This subsection provides a single coherent theme, tying together the disparate elements of the FPA.⁵ Congress directed the Federal Energy Regulatory Commission (Commission) to use all of its authority under the FPA to accomplish a specific Congressional goal, in short, to ensure that Load-Serving Entities (LSEs) can obtain the long-term transmission service they need to meet their obligations to their electric consumers.

This article examines several of the Commission's major policy orders issued in the two years following enactment of the EAct'05 to determine the extent to which the Commission has incorporated the new FPA section 217(b)(4) into its thinking. The article concludes that while the Commission has made some progress, its record is mixed. In many cases the Commission has completely ignored the new Congressional direction. And, where the Commission has addressed it, it appears that the Commission is reluctant to embrace fully this new set of priorities.

In response, this article recommends certain changes to the Commission's major policy orders to incorporate the directions of section 217(b)(4). The article also recommends that on a going-forward basis, at least until it becomes second nature to Commission staff, the Commission adopt a formal review of all major orders issued under the FPA to confirm that they are responsive to section 217(b)(4).

A. Background

Prior to the EAct'05, the FPA lacked any general statement of purpose to guide the Commission in the exercise of its broad authority under the FPA's substantive provisions. That has left the Commission considerable discretion to give meaning to amorphous concepts such as "unjust, unreasonable, unduly

2. Energy Policy Act of 1992, Pub. L. No. 102-58, 106 Stat. 2776 (1992). See also Jay A. Morrison, *EPA Act 2005: A Roadmap for Open Access*, 18 ELECTRICITY J. 10, 31 (2005).

3. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

4. *Id.* § 1233(a), adding FPA § 217(b)(4).

5. 16 U.S.C. §§ 791a-828c (2000).

discriminatory or preferential”⁶ and “consistent with the public interest.”⁷ The courts have repeatedly recognized the broad scope of that discretion.⁸

Over the past decade alone, the FPA’s lack of guidance has allowed different Commissions to move in very different regulatory directions as different Commissioners have applied their disparate visions of the industry to the same statutory language. The Commission has transitioned rapidly from the longstanding traditional vision of the industry that largely prevailed from 1935 to 1996,⁹ through the open-access regime initiated in 1996, under Chairman Moler;¹⁰ through a brief period of *laissez faire* market vision driven by Chairman Hebert;¹¹ through the regulated centralized market vision promoted by Chairman Wood;¹² to the hybrid system recognized and accepted most recently in Order No. 890, under Chairman Kelliher.¹³ These rapid policy shifts have created significant uncertainty in the industry, undermining needed investment and perpetuating disputes amongst industry participants over the proper limits of Commission authority.¹⁴

6. Federal Power Act § 206(a), 16 U.S.C. § 824e(a) (2000).

7. *Id.* § 203(a)(4), 16 U.S.C. § 824b(a)(4).

8. *See, e.g.*, *New York v. FERC*, 535 U.S. 1 (2002) (concluding that the FERC acted within its discretion, and made a statutorily permissible policy choice not to exert jurisdiction over bundled retail transmission); *Mississippi Power & Light Co. v. Miss.*, 487 U.S. 354, 381 (1988) (Scalia, J. concurring) (discussing Supreme Court precedent requiring court deference to Commission interpretation of the Federal Power Act).

9. *See* 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*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,036, at pp. 31,639-31,651 (1996), 61 Fed. Reg. 21,540 (1996) (discussing the history of the industry) [hereinafter Order No. 888], *order on reh’g*, Order No. 888-A, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,048 (1997), 62 Fed. Reg. 12,274 (1997), *order on reh’g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 F.E.R.C. ¶ 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).

10. *See id.*; *see also* Order No. 889, *Open Access Same-Time Information System and Standards of Conduct*, F.E.R.C. STATS. & REGS. ¶ 31,035, at p. 31,588 (1996), 61 Fed. Reg. 21,737 (1996), *order on reh’g*, Order No. 889-A, F.E.R.C. STATS. & REGS. ¶ 31,049 (1997), 62 Fed. Reg. 12,484 (1997), *reh’g denied*, Order No. 889-B, 81 F.E.R.C. ¶ 61,253 (1997), *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). Certainly, Order No. 888 did not appear from nowhere. The industry had started to change during the previous decade as the Commission began to require public utilities to offer open access transmission service as a condition on market based rate authority and certain mergers. *See, e.g.*, Order No. 888, *supra* note 9, at pp. 31,643-31,644. Nevertheless, it is hard to argue that Order No. 888 and its requirement that public utilities file a standardized Open Access Transmission Tariff was not a dramatic departure from prior Commission practice.

11. *See, e.g.*, Press Release, XEnergy, FERC Chairman Hebert Offers Solutions to California Energy Crisis At XENERGY Executive Forum (Feb. 13, 2001), <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-13-2001/0001426338&EDATE>. Zachary Coile, *Energy chair to leave post after 7 months*, S.F. CHRONICLE, Aug. 7, 2001, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2001/08/07/MN204240.DTL&type=printable>.

12. *See* Notice of Proposed Rulemaking, *Remedying Discrimination Through Open Access Transmission Service and Standard Electric Market Design*, F.E.R.C. STATS. & REGS. ¶ 32,563 (2002), 67 Fed. Reg. 55,541 (2002) [hereinafter SMD NOPR]; FERC, WHITE PAPER ON BULK POWER MARKET DESIGN (2003).

13. Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Services*, 118 F.E.R.C. ¶ 61,119 (2007), 72 Fed. Reg. 12,266 (2007) (*reh’g pending*) [hereinafter Order No. 890]. The Order No. 890 world differs from that established by Order No. 888 in its express acknowledgement and acceptance of the RTOs and centralized markets that had not yet existed in 1996.

14. *See* Jay A. Morrison, *The Clash of Industry Visions*, 18 ELECTRICITY J. 1, 14 (2005).

B. Section 217(b)(4)

With the enactment of the EAct'05, these rapid swings in direction could soon wind down towards a more consistent vision. In the EAct'05, Congress enacted a new provision of the FPA, section 217(b)(4), stating:

The Commission shall exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligation of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.¹⁵

This unique language¹⁶ gave the Commission express direction to exercise its authority under the entire FPA towards a specific purpose. The Commission need no longer guess at what Congress wants it to accomplish. At least within the realm of issues addressed by section 217(b)(4), “just and reasonable” and “public interest” no longer lack any specific Congressional guidance.

Certainly, FPA section 217(b)(4) does not fully and finally define those terms. It does not encompass the full range of concerns Congress held when it included those terms in the FPA in 1935. Nor does FPA section 217(b)(4) resolve all disputes between warring factions within the industry. Section 217(b)(4) is not stated “exclusively,” to preclude the Commission from pursuing any other goals besides those it enunciates. If the FPA were a paint-by-numbers canvas, FPA section 217(b)(4) is only an incomplete color key, instructing the artist which colors to paint in areas marked “1” and “2.”

Nevertheless, even an incomplete key is determinative with respect to those areas it addresses. The Commission may not entirely disregard FPA section 217(b)(4) or pursue regulatory goals other than those Congress enunciated in FPA section 217(b)(4) if doing so would conflict with Congress’s direction. The Commission may not leave the canvas blank or use blue paint where Congress has required red or green.

Further, even an incomplete key gives some guidance to what the rest of the painting should look like. The artist may still have interpretive discretion outside the areas governed by the key, but that discretion should not be exercised in a way that clashes with the known areas. Where sections of the painting must be bright red or green, the artist can hardly color the rest of the painting in black and white, or in muted earth tones. Even in areas not governed by section 217(b)(4), the Commission should not pursue a regulatory vision that is entirely inconsistent with the directives Congress codified in that section.¹⁷

For these reasons, it is critical to understand the concepts that Congress incorporated into section 217(b)(4).

15. Energy Policy Act of 2005 § 1233(a), *adding* FPA § 217(b)(4).

16. A search of LEXIS finds no other provision in federal law similarly instructing any other federal agency in how it is to exercise its authority under its *entire* authorizing statute.

17. See GEORGE COSTELLO, CRS REPORT 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS, CRS-2 (2006) (“A cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes.”) [hereinafter STATUTORY INTERPRETATION].

1. The Goals of Section 217(b)(4)

Section 217(b)(4) enunciates two goals. First, the Commission must use its authority “in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligation of the load-serving entities.”¹⁸ Second, the Commission must use its authority to “enable[] load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.”¹⁹ These are separate but complementary obligations.²⁰

In order to clarify its intentions, Congress here added several new concepts that had not previously been codified in the FPA.

a. Load Serving Entity

The first new concept is “load-serving entity.” Congress defines an LSE as “a distribution utility or an electric utility that has a service obligation.”²¹ A distribution utility is defined as “an electric utility that has a service obligation to end-users or to a State utility or electric cooperative that, directly or indirectly, through one or more additional State utilities or electric cooperatives, provides electric service to end users.”²² A “service obligation” is defined as “a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State, or local law or under long-term contracts to provide electric service to end-users or to a distribution utility.”²³ Thus, in short, an LSE is an entity that has a legal or contractual obligation, directly or indirectly, to serve end-use consumers. It does not include an independent power producer (IPP) or power marketer unless the IPP or power marketer has a long-term contract directly with a retail customer or a long-term contract with a State utility or electric cooperative that itself, directly or indirectly, has an obligation to serve retail consumers. Power marketers and IPPs participating solely in short-term markets and those *in search of* load-serving customers are not LSEs.

Prior to the EPAct'05, the FPA concerned itself with protecting wholesale power customers and transmission customers. It did not distinguish between types of customers—all were treated equally. In section 217(b)(4), Congress has now recognized a specific class of transmission system users, LSEs, and it has required the Commission to pay particular attention to their transmission needs in all of its efforts under the FPA.

Section 217(b)(4) does not expressly speak to non-LSEs at all. It does not take existing FPA protections away from non-LSEs. The Commission must, therefore, continue to ensure that the rates, terms, and conditions of wholesale

18. Energy Policy Act of 2005 § 1233(a), adding FPA § 217(b)(4).

19. *Id.*

20. See Order No. 681, *Long-Term Firm Transmission Rights in Organized Electricity Markets*, 116 F.E.R.C. ¶ 61,077, at PP 79-80 (2006), 71 Fed. Reg. 43,564 (2006), *order on reh'g*, Order No. 681-A, 117 F.E.R.C. ¶ 61,201 (2006) [hereinafter Order No. 681] (explaining that section 217(b)(4) includes two separate directives and thus that LSEs are entitled to receive LTTRs from existing capacity as well as from new capacity arising from future system expansions).

21. Energy Policy Act of 2005 § 1233(a), adding FPA § 217(a)(2).

22. *Id.*, adding FPA § 217(a)(1).

23. Energy Policy Act of 2005 § 1233(a), adding FPA § 217(a)(3).

power and interstate transmission service purchased by non-LSEs are just, reasonable, and not unduly discriminatory or preferential. Moreover, the Commission may use its existing authority to facilitate transmission planning and expansion to meet the needs of non-LSE as well as LSEs. It may use its existing authority to ensure that non-LSEs have access to long-term transmission rights (LTTRs).

If, however, the questions arise “for whom should the transmission system be planned and expanded?” or “for whom must the Commission ensure adequate LTTRs?” Congress has answered: LSEs. If a conflict arises between the transmission needs of non-LSEs and LSEs and the Commission must decide how to apportion available resources, Congress has put its thumb on that scale. The Commission may not approve any specific market structure or regulatory device unless that order adequately implements section 217(b)(4). The Commission must exercise its authority to facilitate planning and expansion for LSEs, and must ensure LSEs can obtain LTTRs.

b. Long-Term

The second new concept codified in section 217(b)(4) is “long-term.” The idea itself is not new. Consistent with even earlier practice, Order No. 888 and the associated standardized open access transmission tariff (OATT) treated transmission service differently in a number of ways depending on the term of the service contract. For example, Order No. 888 gave priority to the long-term point-to-point service requests over short-term point-to-point service requests.²⁴ Also, reservations for short-term firm point-to-point service are conditional based on the length of the requested transaction.²⁵ The FPA, however, had not previously distinguished amongst transmission customers based on the duration of their power arrangements or their transmission service requests.

By expressing its interest in meeting the long-term transmission needs of those with long-term power-supply arrangements, Congress stepped right into an ongoing debate between two different visions of the electric utility industry.

On one side are the LSEs with service obligations to consumers that depend on their own generation or long-term power purchase agreements (PPAs) to provide their consumers with low and stable power prices. For those LSEs, and the power suppliers that enter into long-term PPAs with them, reliable transmission service at predictable rates is necessary for the full operational life of their owned resources and for the full term of their long-term PPAs. Uncertainty or volatility in the short-run undermines the economics of the investments and makes it difficult or impossible to obtain long-term financing for the generation the LSEs need to serve their consumers. Ensuring appropriate long-term investment, this group argues, is more important than maximizing short-term efficiencies.²⁶

On the other side are some power marketers, IPPs, and economists who consider it to be inefficient to focus on long-term arrangements. It is better, this

24. Order No. 888-A *pro forma* OATT, *supra* note 9, § 13.2.

25. *Id.*

26. See, e.g., Order No. 681, *supra* note 20, at P 11; AMERICAN PUBLIC POWER ASSOCIATION, RESTRUCTURING AT THE CROSSROADS: FERC ELECTRIC POLICY RECONSIDERED (2004), <http://www.appanet.org/files/PDFs/APPAWhitePaperRestructuringatCrossroads1204.pdf>.

group argues, to allow the price of transmission to vary with locational price of electric generation on a real time basis. That would maximize use of the transmission system; allocate limited transmission resources to those who value them the most as demonstrated by willingness to pay; and provide price signals for the efficient addition of new transmission and generation capacity. If individuals need long-term certainty, the second group argues, the individuals can either invest in new transmission capacity in exchange for financial rights to the use of the new capacity or the market would provide adequate hedging instruments to meet the need. In other words, the argument goes, by ensuring that the short-term markets are efficient, the Commission can ensure the efficient allocation of resources in the long-run.²⁷

Congress did not fully resolve this issue in favor of one side or another. On one hand, neither section 217(b)(4) nor any other provision in the EPAct'05 requires the Commission to dismantle the organized markets that presently use locational pricing mechanisms for transmission. Nor does the EPAct'05 prohibit the voluntary expansion of those markets.²⁸ In fact, the EPAct'05 expressly recognizes that those markets exist and will continue to exist. For example, section 217(b)(4) itself specifically provides that LSEs' long-term rights may be either the "firm" physical rights that would be available in non-Regional Transmission Organization markets or the "equivalent tradable or financial rights" that would be available in Regional Transmission Organization (RTO) markets with locational marginal pricing. Moreover, as discussed in more detail below, Congress required that the Commission issue a rule within one year of enactment of the EPAct'05 to implement section 217(b)(4) within RTO markets.²⁹

On the other hand, Congress clearly knocked one leg out from under many of the market advocates. Rather than putting all its faith in short-term markets and market signals for infrastructure allocation and expansion, section 217(b)(4) directs the Commission to use its authority under the FPA proactively to enable LSEs to obtain long-term firm (or equivalent) transmission rights.³⁰ Where there is an excess of transmission, and that excess is likely to continue into the foreseeable future, there need not be any conflict with market approaches. Where, however, there is congestion today or will likely be congestion in the future, Congress again placed its thumb on that scale. Section 217(b)(4) provides that LSEs with long-term power supply arrangements should not be forced to compete with other transmission customers for limited transmission capacity; they should not have to rely on third-parties to obtain long-term hedges from volatile transmission prices; and they should not have to trust that price

27. See, e.g., Order No. 681, *supra* note 20, at P 12; WILLIAM W. HOGAN, TRANSMISSION CAPACITY RIGHTS FOR THE CONGESTED HIGHWAY: A CONTRACT NETWORK PROPOSAL (1991), <http://ksghome.harvard.edu/~whogan/ferc691r.pdf>; Supplemental Comments of Electric Power Supply Association on the Establishment of Long Term Transmission Rights in Organized Electricity Markets, *Long Term Firm Transmission Rights in Organized Markets*, Docket No. RM06-8-000 (F.E.R.C. Sept. 13, 2006).

28. Prior to enactment of EPAct'05, Congress considered several draft provisions that would have prohibited or delayed finalization of the SMD NOPR. They were withdrawn only after the Commission terminated the proceeding. See Order Terminating the Proceedings, *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, 112 F.E.R.C. ¶ 61,073 (2005).

29. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1233(b), 119 Stat. 594, 960 (2005).

30. *Id.* § 1233(a), adding FPA § 217(b)(4).

signals will be adequate to ensure sufficient transmission capacity is built to meet future needs. Although many market participants believe that doing so undermines short-term efficiencies, the Commission must ensure that transmission capacity is available on a long-term basis to meet the reasonable needs of those LSEs with long-term power supply arrangements.³¹

c. Transmission Planning and Expansion

This last point highlights a third new concept that section 217(b)(4) clearly enconces in the FPA for the first time: planning and expansion of the transmission system. Until the EPAct'05, the Commission had read the obligation of transmission providers to plan and expand the system into the FPA's requirement in sections 205 and 206 that transmission service be provided under terms and conditions that are just and reasonable and not unduly discriminatory or preferential. Because transmission providers plan and expand the system for their own needs, the Commission has reasoned that they must do so for their transmission customers as well.³² The Commission effectively read planning and expansion into its existing authority under FPA sections 205 and 206 and the courts have since confirmed that approach.³³

Congress has now blessed the Commission and judicial interpretation of the FPA in section 217(b)(2). As discussed in more detail below, section 217(b)(4) does not give the Commission any additional authority. Nevertheless, Congress clearly assumed in section 217(b)(4) that the Commission had the ability under its existing authority to facilitate planning and expansion of the transmission system, and directed the Commission to do so to meet the reasonable needs of LSEs. Congress also clearly assumed in section 217(b)(4) that the Commission had the ability under its existing authority to enable LSEs to obtain as much long-term transmission service as they reasonably need, regardless of existing or projected future transmission shortages. It follows, therefore, that Congress assumed not just that the Commission had the authority to "facilitate" planning and expansion of the system, but that the Commission had the further authority to take positive steps to ensure that the system would grow to meet those needs. This would not mean much if the Commission did not have the authority to compel necessary system expansions.³⁴ Congress' assumption was not unreasonable in light of existing tariff provisions adopted by the Commission in Order No. 888 (and approved by the Supreme Court),³⁵ that require transmission

31. See, e.g., Order No. 681, *supra* note 20, at P 330.

32. Order No. 888, *supra* note 9, at p. 31,694.

33. See *New York v. FERC*, 535 U.S. 1 (2002).

34. This conclusion is not undermined by Congress's decision in FPA sections 215(a)(3) and 215(i) to exclude transmission expansion from the new reliability regime. The North American Reliability Organization (NERC) has never had the authority to direct expansion of the transmission system. Transmission providers have had the ability to choose how best to comply with reliability standards, and could choose to curtail transmission transactions rather than expand transmission capacity. New FPA section 215 merely preserves existing limits on the scope of reliability standards. The fact that Congress chose to impose limits on NERC and the Commission under the new reliability regime in no way limits the Commission's separate authority under sections 205 and 206 of the FPA to take affirmative actions required to ensure that transmission service is offered under rates, terms, and conditions that are just and reasonable and not unduly discriminatory or preferential.

35. See *New York*, 535 U.S. 1.

providers to build transmission needed to meet the needs of network and long-term point-to-point transmission customers.³⁶ To the extent some question whether the FERC has the authority under FPA sections 205 and 206 to compel expansion of the system, section 217(b)(4) should settle the issue. The Commission assumed it had the authority, the courts agreed, and Congress has now ratified that interpretation of the statute.³⁷

2. How Far Can and Should the Commission Go to Pursue Section 217(b)(4)'s Goals?

Section 217(b)(4) provides the Commission with very broad direction to “exercise the authority of the Commission under this Act” to pursue the subsection’s goals.³⁸ While section 217(b)(4) does not grant the Commission any new jurisdiction or authority, it reaches to every one of the Commission’s existing responsibilities and powers under the FPA. This includes the Commission’s obvious authority to reject or condition its approval of the rates, terms, and conditions of wholesale power sales and transmission in interstate commerce, including, of course, the Commission’s authority to reject or condition its approval of applications for market-based rates and incentive rates. It also includes the Commission’s authority over interconnection and coordination of facilities,³⁹ power pools,⁴⁰ mergers and disposition of property,⁴¹ adequacy of service,⁴² reliability,⁴³ transmission siting,⁴⁴ market manipulation,⁴⁵ and others. This gives the Commission a tremendous range of tools it can use—and is now obligated to use—to pursue the Congressional goals enunciated in section 217(b)(4).

Having noted the range of tools, however, does not answer the question how aggressively the Commission is obligated to wield them in this context. As discussed above, section 217(b)(4) imposes two new obligations on the Commission. First, the Commission must use its authority under the FPA to

36. See Order No. 888-A *pro forma* OATT, *supra* note 9, §§ 13.5 (“In cases where the Transmission Provider determines that the Transmission System is not capable of providing Firm Point-To-Point Transmission Service . . . the Transmission Provider will be obligated to expand or upgrade its Transmission System pursuant to the terms of Section 15.4.”), 15.4 (requiring Transmission Providers to use due diligence in their efforts to expand or modify the transmission system to provide requested Firm Transmission Service, so long as the Transmission Customer agrees to pay for the upgrade), and 28.2 (“The Transmission Provider shall . . . consistent with Good Utility Practice, endeavor to construct and place into service sufficient transmission capacity to deliver the Network Customer’s Network Resources to service its Network Load on a basis comparable to the Transmission Provider’s deliver of its own generating and purchased resources to its Native Load Customers.”).

37. By enacting section 217(b)(4), Congress not only “acquiesced” in the Commission assumption that it had the authority to order expansion of the transmission system to prevent undue discrimination, but actually relied on that Commission interpretation of its own authority to give meaning to this section. See STATUTORY INTERPRETATION, *supra* note 17, at CRS-46.

38. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1233(a), 119 Stat. 594, 958 (2005), *adding* FPA § 217(b)(4).

39. Federal Power Act § 202, 16 U.S.C. § 824a (2000).

40. 16 U.S.C. § 824a-1.

41. Federal Power Act § 203, 16 U.S.C. § 824b.

42. *Id.* § 207, 16 U.S.C. § 824f.

43. Energy Policy Act of 2005 § 1211, *adding* FPA § 215.

44. *Id.* § 1221(a), *adding* FPA § 216.

45. Energy Policy Act of 2005 § 1238, *adding* FPA § 222.

“facilitate” the planning and expansion of transmission to meet the long-term needs of LSEs. “Facilitate” is an unusual term in the statutory context. While the Commission must make planning and expansion “easy or less difficult,”⁴⁶ section 217(b)(4) does not say “require” or “mandate.” Some will argue that this means that the Commission need do nothing more than permit public utilities to continue to engage in their existing planning and expansion activities. That argument, however, ignores the remainder of the provision.

Section 217(b)(4) requires that the Commission exercise its authority under the FPA to facilitate planning and expansion “to meet the reasonable needs of load-serving entities”⁴⁷ This language clearly indicates that the Commission is not being directed merely to step out of the way of transmission providers’ efforts to meet their *own* future transmission needs. Rather, the Commission is being directed to use the authority available to it under the FPA to make it easier for the system to be planned to meet the needs of *all* LSEs, not just LSEs that happen to be transmission providers. If that is not happening today, and the Commission has acknowledged it is not,⁴⁸ then the FPA requires that the Commission take affirmative steps to ensure that those responsible for planning and expanding the transmission can (and *do*) plan for the needs of all LSEs. Rules of statutory construction provide that words in a statute must be construed to mean something.⁴⁹ Congress could not have intended that the Commission stand aside and do nothing if those with the power and ability to plan and expand the system to meet the reasonable needs of transmission-dependent utilities (TDU) LSEs fail to do so. That would hardly “facilitate” planning and expansion on behalf of those transmission-dependent LSEs.

Even if section 217(b)(4)’s first clause were a nullity, section 217(b)(4)’s second active clause requires the Commission to exercise its authority to “enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.”⁵⁰ The Commission must actively take steps to ensure that LSEs have access to sufficient transmission capacity on a long-term basis to serve their consumers.

The second clause and the first clause should be read together. If LSEs are not able to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis unless the transmission system is planned and expanded for that purpose, then the Commission’s obligation extends beyond merely facilitating. The clauses read together subject the Commission to the

46. BLACK’S LAW DICTIONARY 627 (8th ed. 1990).

47. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1233(a), 119 Stat. 594, 957, *adding* FPA § 217(b)(4).

48. *See, e.g.*, Order No. 890, *supra* note 13, at PP 421-425.

49. *See* STATUTORY INTERPRETATION, *supra* note 17, at CRS-12.

50. Energy Policy Act of 2005 § 1233(a), *adding* FPA § 217(b)(4) (emphasis added). Contrary to the argument some have made, this obligation applies in both RTO and non-RTO regions. It is true that EPAct’05 section 1233(b) required the Commission to issue a rulemaking to implement section 217(b)(4) in RTO regions within one year, but section 217(b)(4) itself—found in EPAct’05 section 1233(a) requires the Commission to enable LSEs to obtain both the tradable or financial rights that prevail in RTO regions and to non-financial “firm transmission rights” that prevail in non-RTO regions. If Congress had intended the provision to apply only within RTOs, it would not have provided for both types of rights. *See also* Order No. 681, *supra* note 20, at P 82 (reaching the same conclusion).

obligation (consistent with its existing broad authority under the FPA) to ensure that the transmission system is, in fact, planned and expanded sufficiently to enable LSEs to meet their long-term needs.⁵¹ If the transmission system lacks the capacity to meet the long-term needs of LSEs on a firm basis, then LSEs have not been “enabled” to obtain long-term firm transmission rights, and the Commission will have failed to meet its obligations under the second active clause of section 217(b)(4).

II. DISCUSSION

A. *Opportunities to Implement New Directions Since the EPAct'05*

In the two years following enactment of the EPAct'05, the Commission was extraordinarily busy. By May 2007, the Commission had issued fourteen final rules, one Notice of Proposed Rulemaking, and seven reports to Congress.⁵² These rulemakings covered a broad range of issues including the Public Utility Holding Company Act of 2005,⁵³ amendments to the Public Utility Regulatory Policies Act,⁵⁴ reliability,⁵⁵ market manipulation,⁵⁶ merger review,⁵⁷ market

51. Some have argued that section 217(b)(4) requires the Commission to ensure access only to existing transmission capacity, and does not impose any obligation on the Commission to ensure planning or expansion even to preserve the value of existing transmission rights over their term, let alone to ensure deliverability of future long-term resources. *See, e.g., id.* at PP 126-40. Others have argued that section 217(b)(4) requires only the facilitation of planning and expansion to ensure LSE long-term access to *future* transmission capacity, and not any priority to existing transmission capacity. *See* Order No. 681, *supra* note 20, at P 71. The Commission has correctly rejected both overly penurious readings of the statute. *See id.* at PP 18-20, 80, 170, 453, 456-457.

52. *Responses to Questions From the Senate Committee on Energy and Natural Resources to the Honorable Joseph T. Kelliher, Nominee to be a Member of the Federal Energy Regulatory Commission*, (May 18, 2007), at 16.

53. Order No. 667, *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, 118 F.E.R.C. ¶ 61,133 (2005) (exempting certain entities from some regulations issued under PUHCA'05), *order on reh'g*, Order No. 667-A, F.E.R.C. STATS. & REGS. ¶ 31,213 (2006), 71 Fed. Reg. 28,446 (2006), *order on reh'g*, Order No. 667-B, F.E.R.C. STATS. & REGS. ¶ 31,224 (2006), 71 Fed. Reg. 42,750 (2006), *order on reh'g*, Order No. 667-C 118 F.E.R.C. ¶ 61,133 (2007); Order No. 684, *Uniform System of Accounts for Centralized Service Companies Subject to the Provisions of the Public Utility Holding Company Act of 2005*, F.E.R.C. STATS. & REGS. ¶ 31,229 (2006) (establishing regulations to implement PUHCA'05).

54. Order No. 671, *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, [Regs. Preambles 2006] F.E.R.C. STATS. & REGS. ¶ 31,203 (2006) (revising the Commission's criteria for the useful thermal output of qualifying facilities under PURPA); Order No. 688, *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, [Regs. Preambles 2006] F.E.R.C. STATS. & REGS. ¶ 31,233 (2006) (providing conditions for the termination of the mandatory purchase and sale requirements for QFs).

55. Order No. 672, *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, F.E.R.C. STATS. & REGS. ¶ 31,204 (2006).

56. Order No. 670, *Prohibition of Energy Market Manipulation*, F.E.R.C. STATS. & REGS. ¶ 31,202 (2006), 71 Fed. Reg. 4244 (2006), *reh'g denied*, 114 F.E.R.C. ¶ 61,300 (2006) (proscribing market manipulation); *Enforcement of Statutes, Orders, Rules and Regulations*, 113 F.E.R.C. ¶ 61,068 (2005); *Process for Assessing Civil Penalties*, 117 F.E.R.C. ¶ 61,317 (2006) (providing a process for assessing civil penalties) [hereinafter *Process for Assessing Civil Penalties*].

57. Order No. 669, *Transactions Subject to Federal Power Act Section 203*, F.E.R.C. STATS. & REGS. ¶ 31,200 (2006), 71 Fed. Reg. 1348 (2006), *order on reh'g*, Order No. 669-A, F.E.R.C. STATS. & REGS. ¶ 31,214

transparency,⁵⁸ transmission pricing,⁵⁹ transmission siting,⁶⁰ LTTRs,⁶¹ market-based rates for wholesale sales,⁶² and reform of the Order No. 888 OATT.⁶³ These activities were bookended by the Commission's 2006 strategic plan⁶⁴ and its 2007 annual report to Congress.⁶⁵

Given FPA section 217(b)(4)'s directive that that Commission "shall exercise the authority of the Commission under this Act in a manner that" accomplishes the goals of the section, one might expect that the Commission would have referred to section 217(b)(4) in each of those rulemakings and reports.⁶⁶ In every one of them, the Commission exercised its authority under the Act. Thus, every one of them presented the Commission with at least some opportunity to facilitate transmission planning and expansion and to enable LSEs to obtain LTTRs. In fact, however, the Commission only referenced section 217(b)(4) explicitly in its rulemakings on LTTRs in RTOs (Order Nos. 681 and 681-A) and on OATT reform (Order No. 890). Moreover, as discussed below, the Commission's record in promoting the goals of section 217(b)(4) in those and its other issuances is mixed at best.

B. 2006 Strategic Plan and Annual Report

Perhaps the clearest illustration of the priority the Commission placed on the new FPA section 217(b)(4) can best be seen in the Commission's 2006-11 Strategic Plan⁶⁷ and its Annual Report.⁶⁸ These documents lay out both the Commission's regulatory plan for 2006 and its accomplishments during the year. In both documents, the Commission clearly expresses the Commission's desire to be responsive to the directions Congress gave the Commission in the

(2006), 71 Fed. Reg. 28,422 (2006), [hereinafter Order No. 669-A], *order on reh'g*, Order No. 669-B, F.E.R.C. STATS. & REGS. ¶ 31,225 (2006), 71 Fed. Reg. 42,579 (2006).

58. *Process for Assessing Civil Penalties*, *supra* note 56; Notice of Proposed Rulemaking, *Transparency Provisions of Section 23 of the Natural Gas Act; Transparency Provision of the Energy Policy Act*, 119 F.E.R.C. ¶ 61,068 (2007).

59. Order No. 679, *Promoting Transmission Investment through Pricing Reform*, F.E.R.C. STATS. & REGS. ¶ 31,222 (2006), 71 Fed. Reg. 43,294 (2006), [hereinafter Order No. 679]; Order No. 679-A, F.E.R.C. STATS. & REGS. ¶ 31,236 (2007), 72 Fed. Reg. 1152 (2007) [hereinafter Order No. 679-A], *order on reh'g*, 119 F.E.R.C. ¶ 61,062 (2007) (establishing standards for the approval of incentive-based rates).

60. Order No. 689, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, F.E.R.C. STATS. & REGS. ¶ 31,234 (2006), 71 Fed. Reg. 69,440 (2006), *order denying reh'g*, 119 F.E.R.C. ¶ 61,154 (2007) (establishing procedures for applications for federal siting authority) [hereinafter Order No. 689].

61. Order No. 681, *supra* note 20 (establishing LTTRs within RTOs).

62. Notice of Proposed Rulemaking, *Market Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 115 F.E.R.C. ¶ 61,210 (2006), 71 Fed. Reg. 33,101 (2006) [hereinafter MBR NOPR].

63. Order No. 890, *supra* note 13.

64. FERC, STRATEGIC PLAN FOR FISCAL YEARS 2006-2011 (2006), <http://www.ferc.gov/about/strat-docs/FY-06-11-strat-plan-print.pdf> [hereinafter STRATEGIC PLAN].

65. FERC, ANNUAL REPORT TO CONGRESS (2006), <http://www.ferc.gov/about/strat-docs/fy06-an-rpt.pdf> [hereinafter 2006 ANNUAL REPORT].

66. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1233(a), 119 Stat. 594, 957 (2005), *adding* FPA § 217(b)(4).

67. STRATEGIC PLAN, *supra* note 64.

68. 2006 ANNUAL REPORT, *supra* note 65.

EPAct'05.⁶⁹ One would expect, therefore, that the Commission would use these documents to explain how it would, and then how it did, implement the directions Congress gave it in FPA section 217(b)(4).

The results are disappointing. First, surprisingly, nowhere in either document does the Commission expressly cite to section 217(b)(4). Despite the fact that this provision is the only statement in the FPA explaining broadly how the Commission is to exercise its authority under the entire Act, the Commission fails to mention it at all, let alone devote any section or even a paragraph in the reports specifically to its implementation.

Several important elements of section 217(b)(4), however, are picked up in the reports. In both documents, the Commission lists its three key goals as energy infrastructure, competitive markets, and enforcement.⁷⁰ The first of these three, stimulating appropriate infrastructure investment, is certainly a natural fit with section 217(b)(4).

Moreover, in both documents, the Commission discusses its efforts—driven by the deadline in section 1233(b)—to provide for LTTRs in RTO markets.⁷¹ Those discussions reflect some awareness of section 217(b)(4), explaining that the purpose of the LTTR rulemaking was to provide certainty to LSEs—as well as other transmission customers.⁷² Both documents also mention Commission efforts to facilitate the planning and expansion of the transmission system. The Commission's 2006 Strategic Plan mentions planning and expansion of the transmission system in the context of its discussion of its LTTR rule within RTOs, and briefly notes that it proposed changes to the OATT to incorporate transmission planning.⁷³ The Commission's 2006 Annual Report also notes that transmission planning is an element of the Commission's OATT reform efforts.⁷⁴

What is left out? First, the reports' brief mentions of transmission planning are not tied to section 217(b)(4). In neither report is the purpose (or even *a* purpose) of planning tied to “the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities.”⁷⁵ Second, the Commission's discussion of LTTRs in the reports is limited to the RTO context. The Commission does not mention any efforts outside of RTOs to “enable[] load serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.”⁷⁶

The Commission's Reports are consistent with its Fact Sheet on the EPAct'05. That Fact Sheet summarizes the “principal policy goals in the areas of the statute that relate to the Commission,”⁷⁷ describe the new responsibilities

69. See, e.g., 2006 ANNUAL REPORT, *supra* note 65, at 3 (“In FY 2006, the Commission worked diligently and met all of the deadlines set by Congress.”).

70. STRATEGIC PLAN, *supra* note 64, at 7, 17, 23; 2006 ANNUAL REPORT, *supra* note 65, at 5.

71. STRATEGIC PLAN, *supra* note 64, at 8; 2006 ANNUAL REPORT, *supra* note 65, at 16.

72. *Id.*

73. STRATEGIC PLAN, *supra* note 64, at 20.

74. 2006 ANNUAL REPORT, *supra* note 65, at 33-34.

75. Energy Policy Act of 2005 § 1233(a), *adding* FPA § 217(b)(4).

76. *Id.*

77. FERC, ENERGY POLICY ACT OF 2005 FACT SHEET 1 (2006), <http://ferc.gov/legal/fed-sta/epact-fact-sheet.pdf>.

the EAct'05 assigns to the Commission, and explains the actions the Commission took to implement the EAct'05. Like the Commission's Reports, the Fact Sheet notes the Commission's effort to provide for LTTRs within RTOs, but never cites to section 217(b)(4) or discusses Commission efforts to implement its substantive provisions outside of the RTO context.⁷⁸

As discussed below, the Commission's reports and the Fact Sheet reasonably reflect the Commission's efforts during the past twenty-two months. The Commission did not focus on the direction Congress gave it outside of RTOs, and even where the Commission promoted goals consistent with the elements of section 217(b)(4), it failed to embrace the entire vision enacted by Congress.

C. OATT Reform (Order No. 890)

On February 16, 2007, the Commission issued Order No. 890, its first major revamp of the Order No. 888 open access transmission tariff since it was first issued in 1996. Order No. 890 included a number of significant reforms, requiring, *inter alia*: greater uniformity and transparency in the calculation of available transfer capability (ATC);⁷⁹ regional joint transmission planning;⁸⁰ and amendments to point-to-point transmission service to incorporate conditional firm service and redispatch service.⁸¹ While a great deal remains to be seen about how Order No. 890 will be implemented, it appears that the Order could make great strides towards accomplishing the goals of section 217(b)(4). Nevertheless, there are some elements of Order No. 890 that could prove to be at odds with the EAct'05 if not clarified or altered.

1. Transmission Planning

The FERC and the courts have long recognized that transmission providers have an incentive to plan, expand, and operate their systems in a manner that discriminates against competing transmission customers, including LSEs. The Commission explained in Order No. 888 that "[i]t is in the economic self-interest of transmission monopolists, particularly those with high-cost generation assets to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves."⁸² In Order 890, the Commission asserted that "[a]lthough many transmission providers have an incentive to expand the grid to meet their state-imposed obligations to serve, they can have a disincentive to remedy transmission congestion when doing so reduces the value of their generation or otherwise stimulates new entry or greater competition in their area."⁸³ The Commission further explained that "[t]he existing *pro forma* OATT does not counteract these incentives in the planning area because there are no clear criteria regarding the transmission provider's planning obligation."⁸⁴

78. *Id.*

79. Order No. 890, *supra* note 13, at P 193.

80. *Id.* at P 418.

81. Order No. 890, *supra* note 13, at P 901.

82. Order No. 888, *supra* note 9, at p. 31,682; *see also*, Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 684 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 535 U.S. 1, 8-9 (2002).

83. *See* Order No. 890, *supra* note 13, at P 422.

84. *See id.* at P 424.

These problems are real, and have put transmission dependent LSEs at a significant competitive disadvantage.

The Commission responded to these problems in Order No. 890. The Commission imposed on transmission providers a clear obligation to establish open and inclusive transmission planning processes for their own service areas, and to participate in regional transmission planning processes that would ensure cross-border concerns would be addressed.⁸⁵ If implemented properly, the new processes should go a long way towards facilitating the planning of the transmission grid to meet the reasonable needs of all LSEs.

There is some ambiguity, however, in Order No. 890 that could undermine the ability of the final Order to promote the goals Congress enunciated in section 217(b)(4). On the one hand, the Commission stated both that:

[T]ransmission planning required by this Final Rule is not intended, as discussed earlier, to be limited to the mere exchange of information and then review of transmission provider plans after the fact. The transmission planning required by this Final Rule is intended to provide transmission customers and other stakeholders a meaningful opportunity to engage in planning along with their transmission providers.⁸⁶

and that: “We are specifically requiring a comparability principle . . . that transmission providers continue to plan their transmission systems such that their own interests are addressed without regard to, or ahead of, the interests of their customers.”⁸⁷

These statements both indicate that the Commission intends the Order No. 890 planning process to be truly open and inclusive, treating the reasonable transmission needs of TDU LSEs on the same footing as the needs of transmission providers.

At the same time, however, the Commission also wrote in Order No. 890 that “[i]n response to the suggestion by some commenters that we require transmission providers to allow customers to collaboratively develop transmission plans with transmission providers on a co-equal basis, we clarify that . . . the ultimate responsibility for planning remains with transmission providers,”⁸⁸ and “[w]e reject arguments made by some commenters that comparability requires that customers have equal weight in decision-making.”⁸⁹

These statements give at least some TDU LSEs concern that the Commission will permit individual transmission providers to ensconce discrimination into their transmission planning processes, reserving to themselves the ability to exclude transmission upgrades required by LSE transmission customers from their transmission plans or otherwise to plan the transmission system in a manner that gives the transmission providers a competitive advantage.⁹⁰

85. Order No. 890, *supra* note 13, at P 435.

86. *Id.* at P 488.

87. Order No. 890, *supra* note 13, at P 495.

88. *Id.* at P 454.

89. Order No. 890, *supra* note 13, at n.289.

90. *See, e.g.*, Request for Clarification and Rehearing of the National Rural Electric Cooperative Association, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-25-000, RM05-17-000, at 14-19 (F.E.R.C. Mar. 19, 2007).

Some participants in the Order No. 890 rulemaking also expressed concern about the Commission's statement: "The Commission . . . will require transmission providers to disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans . . . to ensure that standards are consistently applied."⁹¹

This statement appears to directly contradict Paragraph 488 of Order No. 890 quoted above. By permitting transmission providers simply "to disclose . . . the basic criteria, assumptions, and data that underlie their transmission system plans,"⁹² it appears that Paragraph 471 of Order No. 890 could be construed as permitting transmission providers to engage in "the mere exchange of information" prohibited by Paragraph 488.⁹³ Paragraph 471 does not seem to envision that transmission customer LSEs will have "a meaningful opportunity to engage in planning along with their transmission providers" by participating in the development of the crucial criteria, assumptions, and data that drive the results of any transmission planning process.⁹⁴

2. Expansion

FPA section 217(b)(4) requires that the Commission facilitate not just planning, but also expansion of the transmission system to meet the reasonable needs of LSEs. That element of FPA section 217(b)(4) does not appear to have been incorporated in Order No. 890. In fact, the Commission goes so far as to state that "our planning reforms do not include an obligation to construct each facility identified in the plan."⁹⁵

In a larger context, Paragraph 594 appears rational. There are many reasons why a particular facility included in a transmission plan might not be constructed. For example, system conditions may change or state regulatory processes may prevent construction of some facilities.

Order No. 890, however, does not provide that broader context. Unlike the OATT, it does not explicitly require that transmission providers use due diligence or Good Utility Practice in their efforts to implement the transmission plans. In fact, it imposes no restrictions on the transmission providers' discretion not to build some facilities in the transmission plans. There is no suggestion in the Order that a transmission provider that has developed a broad, nondiscriminatory plan could not then go forward and build only those facilities in the plan that meet its needs and otherwise provide it a competitive advantage. Nothing in Order No. 890 would expressly prohibit a transmission provider from implementing the transmission plan and expanding the system in a discriminatory fashion. If the Commission had internalized its obligations under FPA section 217(b)(4), it would have used the opportunity in Order No. 890 to emphasize or even strengthen those sections, rather than undermining them.

The Commission also failed to design the redispatch and conditional firm services in a manner that would promote expansion of the transmission system to meet LSEs' long-term needs. The Commission rejected arguments by some

91. Order No. 890, *supra* note 13, at P 471.

92. *Id.* at P 471.

93. Order No. 890, *supra* note 13, at P 488.

94. *Id.* at P 488.

95. Order No. 890, *supra* note 13, at P 594.

commenters that the Commission should only make these new elements of point-to-point service available on an interim basis to transmission customers that agreed to support whatever improvements the transmission system would require to provide transmission service without redispatch or conditions.⁹⁶ Redispatch or conditional service would enable those customers to obtain at least some transmission service immediately, but would be replaced with traditional transmission service as soon as the necessary system upgrades had been completed. This approach, commenters argued, would increase availability of transmission service, provide greater protection for the quality and reliability of service received by existing long-term transmission customers, and preserve transmission customers' incentive to fund necessary system upgrades.

More concerned about short-term uses of the grid than encouraging its expansion, however, the Commission chose to require transmission providers to allow transmission customers to request these services in lieu of making the necessary upgrades to accommodate the transmission service requests in the first instance.⁹⁷ Unlike the commenters' approach, the Commission's approach permits transmission customers to "free ride" on a transmission infrastructure funded by others and avoid the cost required to make the upgrades required to ensure long-term reliable service on congested facilities.

3. LSEs

As noted above, section 217(b)(4) incorporated a new concept into the FPA, a priority for the long-term needs of LSEs. Order No. 890 did a respectable job of addressing that concern.⁹⁸

First, and perhaps most importantly, most LSE representatives commenting on the rulemaking asked the Commission to adopt only incremental reforms and not eliminate or dramatically alter the existing network and point-to-point transmission services. Many LSEs consider those services to be critical to their ability to meet the long-term needs of their consumers.⁹⁹ The Commission accepted those comments over the objections of some, such as the Transparent Dispatch Advocates (TDA), who called for a dramatic change in the way the system is operated.¹⁰⁰ The Commission did not eliminate network and point-to-point service or replace them with contract demand service;¹⁰¹ nor did it require hourly firm service to be provided, both which would have significantly altered the nature of the transmission services available to LSEs to increase the short-term efficiency of the system.¹⁰²

96. *Id.* at P 909 (acknowledging commenters' concern).

97. Order No. 890, *supra* note 13, at P 981.

98. Note, however, that commenters disagreed as to what section 217 requires, and as to how broadly the term "LSE" should be read. Some investor-owned utilities, for example, had a narrower view of what constitutes an "LSE" or an LSE's "native load." Those commenters are likely less satisfied with Order No. 890 than are the TDU LSEs. *See, e.g., id.* at PP 95-109.

99. *See e.g.,* Order No. 890, *supra* note 13, at P 907 (citing to comments by Ameren, Duke, Entergy, LPPC, Progress Energy, Santee Cooper, Salt River, and a number of other LSEs and their representatives).

100. Reply Comments of PJM Interconnection, L.L.C., *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-25-00, RM05-17-000 (F.E.R.C. Sept. 20, 2006).

101. Order No. 890, *supra* note 13, at P 115.

102. *Id.* at P 1212.

Second, several LSE commenters opposed planning resdispatch and conditional firm service on the basis that they would undermine the reliability and quality of the long-term services that they use to meet their service obligations.¹⁰³ Although the Commission did amend point-to-point service to incorporate planning resdispatch and conditional firm services, it adopted many of the conditions or limitations on those services sought by LSEs.

For example, with respect to planning resdispatch, the Commission declined to accept the TDA proposal to require economic dispatch of all resources in a region, including generation resources that are neither owned nor operated by the transmission provider. The Commission also reiterated that planning resdispatch should not be offered if it would “(1) degrade or impair the reliability of service to native load customers, network customers and other transmission customers taking firm point-to-point service, or (2) interfere with the transmission provider’s ability to meet prior firm contractual commitments to others.”¹⁰⁴ With respect to conditional firm, the Commission provided for the restudy and reevaluation of the conditions on service every two years¹⁰⁵ and emphasized that transmission providers would not be required to offer conditional firm service if doing so would impair system reliability.¹⁰⁶

On the other hand, representatives of LSEs have expressed concern on rehearing that the Commission took a number of steps that could undermine the quality of network service. For example, Order No. 890 denies network customers the ability to designate conditional resources within the same balancing area, even though transmission providers may access those resources for their own consumers and point-to-point customers can access those resources with conditional firm service.¹⁰⁷ Order No. 890 also permits transmission providers the right to deny network customers’ requests to undesignate network resources, limiting their ability to access new sources of generation.¹⁰⁸ Order No. 890 also appears to reduce the scheduling priority of secondary network service and to alter the timing for scheduling secondary service in a manner that undermines the flexibility and value of the service.¹⁰⁹

103. See Supplemental Comments on Notice of Proposed Rulemaking of the National Rural Electric Cooperative Association, Affidavit of Joe N. Linxwiler, Jr. on Behalf of National Rural Electric Cooperative Association, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-25-000, RM05-17-000 (F.E.R.C. Dec. 15, 2006).

104. Order No. 890, *supra* note 13, at P 946.

105. *Id.* at P 959.

106. Order No. 890, *supra* note 13, at PP 941, 952.

107. *Id.* at PP 928-29. See also Request for Clarification and Rehearing of the National Rural Electric Cooperative Association, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-17-000, RM05-25-000, at 48 (F.E.R.C. Mar. 19, 2007); Request for Rehearing and Clarification of the Transmission Access Policy Study Group, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-17-001, RM05-25-001, at 41 (F.E.R.C. Mar. 19, 2007).

108. Order No. 890, *supra* note 13, at 1586. See also Request for Clarification and Rehearing of the National Rural Electric Cooperative Association, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-17-000, RM05-25-000, at 57 (F.E.R.C. Mar. 19, 2007); Request for Rehearing and Clarification of the Transmission Access Policy Study Group, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-17-001, RM05-25-001, at 64 (F.E.R.C. Mar. 19, 2007).

109. Order No. 890, *supra* note 13, at PP 1601-1606. See also Request for Clarification and Rehearing of the National Rural Electric Cooperative Association, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-17-000, RM05-25-000, at 61-69 (F.E.R.C. Mar. 19, 2007); Request

4. Long-term

The last major new concept that section 217(b)(4) imported into the FPA was the importance of meeting LSE's reasonable long-term needs. Order No. 890 appears to have been sensitive to that concern as well.

As noted above, the Commission declined to force transmission customers from the long-term stability they enjoy under network and point-to-point transmission services.¹¹⁰ The Commission also declined to mandate an hourly firm service, after several commenters complained that an hourly firm service would provide certainty to short-term transactions at the expense of the quality and reliability of service that transmission customers receive under network and long-term point-to-point service.¹¹¹

Further, as noted above, the Commission amended its original proposals for conditional firm service and redispatch service in order to limit the impacts that these elements of point-to-point service could have on long-term transmission customers. Particularly important were the Commission's decision to permit transmission providers to reassess the availability of conditional firm service every two years¹¹² and the Commission's recognition that transmission providers will need to use conservative assumptions in defining the limits on conditional firm service.¹¹³ Each of those changes helps to ensure that promises made to conditional firm service customers do not undermine the reliability of service offered to existing long-term network and point-to-point customers during the out-years of the conditional firm service agreement.

Finally, the Commission amended the rules for rolling over transmission service agreements. Under Order No. 888, a transmission customer taking point-to-point transmission service of at least one year in duration could roll-over its transmission service agreement by providing notice sixty days before the expiration of its service agreement.¹¹⁴ Order No. 890 amends those provisions, restricting roll-over rights to those with transmission service agreements of at least five years duration and requiring notice one year before the expiration of the agreement.¹¹⁵ The Commission explained that "one of the primary goals of

for Rehearing and Clarification of the Transmission Access Policy Study Group, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket Nos. RM05-17-001, RM05-25-001, at 65 (F.E.R.C. Mar. 19, 2007). Moreover, while Order No. 890 did reasonably well for many LSEs, it is important to recognize, that the Commission also focused to a great degree on serving the needs of non-LSEs. For example, the Commission removed the price cap on reassignment of transmission capacity. The Commission reversed course in Order No. 890 "[t]o foster the development of a more robust secondary market for transmission capacity . . ." Order No. 890, *supra* note 13, at P 808. Predictably, that change in direction was supported by wind interests, power marketers, and IPPs. Proponents of the policy change included Allegheny, AWEA, Constellation, EPSA, Exelon, Morgan Stanley, and PPL. *See id.* at n.454. It was opposed by transmission dependent LSEs: APPA, NRECA, TAPS, Public Power Council, and WAPA. Order No. 890, *supra* note 13, at n.468.

110. *Id.* at P 115.

111. Order No. 890, *supra* note 13, at PP 1181, 1189, 1212.

112. *Id.* at PP 959, 981.

113. Order No. 890, *supra* note 13, at PP 913, 1067.

114. *Id.* at P 1214.

115. Order No. 890, *supra* note 13, at P 1231.

the rollover reform . . . is to improve transmission planning and encourage longer-term contracting.”¹¹⁶

D. LTTR Final Rule

As noted above, the Commission issued an order in July 2006 to require RTOs to make LTTRs available to LSEs. In issuing this rule, the Commission complied with the obligation imposed by EAct’05 section 1233(b) to implement section 217(b)(4) within Transmission Organizations with organized markets.¹¹⁷ To do so, the Commission had to overcome significant opposition from RTOs and from transmission customers that rely on short-term transmission service.¹¹⁸ Nevertheless, the Commission engaged in a good faith effort to interpret the obligation to offer LTTRs broadly enough to give LSEs a tool that would genuinely permit them to obtain and deliver long-term generation resources to their consumers at a predictable price.¹¹⁹

In general, the Commission required each RTO that operates Day-2 markets to make available long-term firm transmission rights that meet seven specific guidelines.¹²⁰ The most important of those for the purpose of this discussion are the following:

(2) [t]he long-term firm transmission right must provide a hedge against day-ahead locational marginal pricing congestion charges or other direct assignment of congestion costs for the period covered and quantity specified. Once allocated, the financial coverage provided by a financial long-term right should not be modified during its term (the “full funding” requirement) except in the case of extraordinary circumstances or through voluntary agreement of both the holder of the right and the transmission organization

(4) Long-term firm transmission rights must be made available with term lengths (and/or rights to renewal) that are sufficient to meet the needs of load serving entities to hedge long-term power supply arrangements made or planned to satisfy a service obligation. The length of a term of renewals may be different from the original term. Transmission organizations may propose rules specifying the length of terms and use of renewal rights to provide long-term coverage, but must be able to offer firm coverage for at least a 10 year period.

(5) Load serving entities must have priority over non-load serving entities in the allocation of long-term firm transmission rights that are supported by existing capacity. The transmission organization may propose reasonable limits on the amount of existing capacity used to support long-term firm transmission rights.¹²¹

116. *Id.* at P 1238. Note, however, that the Commission rejected a request by APPA and TAPS to change their designated resources and receipt points when the service agreement is rolled over. Order No. 890, *supra* note 13, at P 1236.

117. Order No. 681, *supra* note 20, at P 16 (“In adopting this Final Rule, the Commission seeks to provide increased certainty regarding the congestion cost risks of long-term transmission service in organized electricity markets that will help load serving entities and other market participants make new investments and other long-term power supply arrangements [T]he long-term firm transmission rights that are made available by transmission organizations that are subject to the rule have characteristics that will support a long-term power supply arrangement. These guidelines provide a framework within which transmission organizations and their market participants can design and implement long-term firm transmission rights in the organized electricity markets that are compatible with the design of those markets, in particular retaining the advantages of price-based congestion management, and meet the reasonable needs of market participants.”).

118. *See, e.g., id.* at P 276.

119. *See, e.g.,* Order No. 681, *supra* note 20, at P 324.

120. 18 C.F.R. § 42.1(d) (2006).

121. *Id.* § 42.1(d)(2)-(5).

These guidelines directly incorporate two of the new concepts that section 217(b)(4) added to the FPA: meeting the needs of LSEs,¹²² and a long-term focus. If implemented properly, they would enable LSEs within RTOs to obtain at least some long-term firm transmission rights to serve long-term power supply arrangements.

Other elements of the LTTR rule also bring in the concepts of planning and expansion. The Commission expressly requires “transmission organizations with organized electricity markets to explain how their transmission system planning and expansion policies will ensure that long-term firm transmission rights, once allocated, remain feasible over their entire term.”¹²³ The Commission did not address planning in this rulemaking to the extent some commenters had hoped, but the Commission has since addressed the issue extensively in Order No. 890. And, again over the objection of the RTOs, Order No. 890 applied its transmission planning requirements to RTOs.¹²⁴ Thus, whether the planning process is adequate to ensure LSE’s access to sufficient LTTRs in RTOs depends in a great degree to whether the Commission appropriately resolves the ambiguities discussed above in Order No. 890’s planning requirements.

As far as it goes, however, the LTTR final rule does not necessarily reach as far as Congress may have expected when it drafted section 217(b)(4).

First, it is unclear whether the LTTR Rule requires RTOs to enable LSEs to obtain as many LTTRs as may be required to meet their reasonable needs. The LTTR Rule provides in Paragraph 323 that RTOs and their stakeholders should have the “flexibility to determine the level at which a load serving entity may nominate long-term firm transmission rights as long as that level does not fall below the ‘reasonable needs’ of the load serving entity.”¹²⁵ The LTTR Rule further leaves it to the discretion of the RTO to determine whether to incorporate load growth in the allocation process. Guideline 5 also states that the RTO “may propose reasonable limits on the amount of existing transmission capacity used to support long-term firm transmission rights.”¹²⁶ Given that the RTOs and many of the RTOs’ stakeholders opposed the creation of LTTRs altogether, leaving that level of discretion to the RTO stakeholder processes puts the Commission’s efforts to achieve its goals very much at risk. The Commission’s commitment on this issue will have to be seen in individual implementation orders.¹²⁷

122. See, in particular, Order No. 681, *supra* note 20, at P 319 (“In our view, a broader preference for load serving entities in general vis-à-vis non-load serving entities is fully supported by the statute and indeed better meets the needs of today’s organized electricity markets.”).

123. *Id.* at P 20.

124. See Order No. 890, *supra* note 13, at PP 157, 437-439.

125. Order No. 681, *supra* note 20, at P 323.

126. *Id.* at P 325.

127. The Commission’s orders on PJM’s compliance filings are promising. The Commission prohibited PJM’s effort to pro-rata allocations of LTTRs in “stage 1A” allocations and ordered PJM’s proposal be modified. See *PJM Interconnection, L.L.C.*, 117 F.E.R.C. ¶ 61,220 (2006), *order on reh’g, Order on Rehearing, Compliance Filings, and Settlement*, 119 F.E.R.C. ¶ 61,144, at PP 24-27 [hereinafter *PJM Order on Rehearing*]. The settlement that the Commission approved included a process that is more likely to award every LSE all the LTTRs they request.

Second, it is not entirely clear that the LTTRs provided by the LTTR Rule are as firm as Guideline 2 states they should be. The Commission explains in Paragraph 170 that “‘firmness’ in this context refers primarily to two properties of the long-term transmission rights: stability in the quantity of rights that a load serving entity is allocated over time and ‘price certainty’ for the load serving entity that seeks to hedge congestion charges”¹²⁸ The Commission also notes that requiring the holder of an LTTR to pay the costs would “largely undercut the relative congestion price certainty provided by full funding”¹²⁹

Nevertheless, the Commission leaves RTOs discretion to determine how to allocate any costs that an RTO may incur in order to ensure that LTTRs remain fully funded. The Commission does not rule out assigning those costs directly to the holders of individual LTTRs that have become infeasible—calling that approach only “probably” unreasonable¹³⁰—and then leaves open a number of other options that do not spread the costs of uplift much more broadly than that.¹³¹ As with the firmness of the LTTR, discussed above, given the RTOs’ hostility to LTTRs and the inherent self interest of non-LSE stakeholders who would rather avoid bearing any share of these costs, it is unlikely that RTO stakeholder processes will act enthusiastically to fulfill section 217(b)(4)’s mandate.¹³²

Third, while the LTTR Rule provides that RTOs must “explain” how their planning and expansion policies will ensure that LTTRs remain feasible over their entire lives, the Commission then states in a footnote that “[w]e are not requiring any ‘obligation to build’ that does not already exist under Order No. 888.”¹³³ This issue is critical to a number of others.

If the RTOs do not continue to expand transmission capacity, LSEs may not be able to obtain as many new LTTRs as they reasonably need to meet new or expanding load obligations. Without adequate planning and expansion, even existing LTTRs may become infeasible in future years. At a minimum, that will mean that there will be excess congestion costs that must be assigned to someone. If a large proportion of these costs are allocated to the holders of LTTRs it will undermine the firmness of the LTTRs. If a large proportion of congestion costs are assigned to others, it will create a significant pressure to deprive LSEs of the LTTRs they need. At worst, inadequate transmission capacity will make it impossible to actually deliver power, undermining reliability. As noted above, the Commission has not recently clarified the extent of the obligation to build in Order No. 888, and even appeared to have undercut that obligation in Order No. 890. Congress would seem to have expected more in section 217(b)(4) when it instructed the Commission to facilitate expansion of the system to enable LSEs to acquire LTTRs.

128. Order No. 681, *supra* note 20, at P 170.

129. *Id.* at P 176.

130. Order No. 681, *supra* note 20, at P 176.

131. *Id.* at PP 177-178.

132. Ultimately, PJM and its stakeholders reached agreement on the broad uplift of all costs arising from any infeasible FTRs (long and short-term) to all FTR holders. *PJM Order on Rehearing*, *supra* note 127, at PP 60-74.

133. Order No. 681, *supra* note 20, at n.22.

Fourth, as noted above, Guideline 4 states that LTTRs must be made available with term lengths (and/or rights to renewal) that are sufficient to meet the needs of LSEs to hedge long-term power supply arrangements made or planned to satisfy a service obligation. Then, however, Guideline 4 and Paragraph 260, together suggest that an RTO may be able to meet this obligation by providing LTTRs for a term of only ten years. While Paragraph 261 indicates that RTOs “may need” to offer longer terms or provide for rolling renewals on ten-year contracts, this paragraph also appears to give RTOs discretion to modify the LTTRs at the end of each rolling ten-year period. If that is, in fact, how the RTOs and the Commission implement the rule, it will come up well short of meeting Congress’s goal. Many power supply arrangements extend considerably beyond a ten-year term. A power plant built to serve load is likely to have a life of thirty to fifty years. Because they are a crucial financing tool for building power plants, many PPAs have terms just as long as the life of a power plant. A ten year transmission contract is not sufficient to meet the needs of an LSE that serves load from a resource with a thirty-year life or thirty-year term. If a ten-year LTTR is all that is available, or if the terms of the available LTTRs could be significantly altered at the end of a ten-year interval, it will dramatically increase the cost of power. Such uncertainty will force investors to accelerate their recovery of the fixed costs of those power plants, spreading the costs of the plants over only one-third or less of their useful lives. It may make the plants entirely uneconomic. That is exactly the kind of problem that Congress sought to address in section 217(b)(4).¹³⁴

The Commission further demonstrates some lack of willingness to fully implement Congress’ long-term focus in Paragraphs 318-330 of Order No. 681. Here, the Commission decided to revise the guidelines for LTTRs to “eliminate the preference for load serving entities with long-term power supply arrangements and replace it with a general preference for load serving entities vis-à-vis non-load serving entities.”¹³⁵ Notwithstanding section 217(b)(4)’s specific direction that the Commission focus on long-term rights, the Commission explains, “a broader preference for load serving entities in general vis-à-vis non-load serving entities is fully supported by the statute *and indeed better meets the needs of today’s organized electricity markets.*”¹³⁶ “Importantly,” the Commission argues, its preferred approach “eliminates the potential for load serving entities that prefer short-term power supply arrangements, or are precluded from entering into long-term arrangements, to be disadvantaged in the allocation of firm transmission rights.”¹³⁷ Where Congress’ vision conflicted with the Commission’s own emphasis on short-term markets, the Commission in effect chose to read some words out of the statute.

134. This problem is not entirely speculative. The New York Independent System Operator has publicly continued to argue that “long-term” means only longer than one year. It is willing to offer only a one-year Transmission Congestion Contract that can be renewed annually at a price that reflects the “market value” of the transmission or, in limited circumstances, a ten year TCC at a fixed price that also reflects the “market value” of transmission service. See Compliance Filing of the New York Independent System Operator, Inc., Docket No. ER07-521-000 (F.E.R.C. Feb. 5, 2007).

135. Order No. 681, *supra* note 20, at P 318.

136. *Id.* at P 319 (emphasis added).

137. Order No. 681, *supra* note 20, at P 322.

E. Transmission Incentives

EPAct'05 section 1241 created a new FPA section 219, that directs the Commission to “establish, by rule, incentive-based . . . rate treatments for the transmission of electric energy in interstate commerce by public utilities for the purpose of benefiting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.”¹³⁸ In particular, section 219 provides that the incentives rule shall “(1) promote the reliable and economically efficient transmission and generation of electricity by promoting capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate commerce, regardless of the ownership of the facilities.”¹³⁹

In response, the Commission issued Order No. 679.¹⁴⁰ Order No. 679 “identifies specific incentives that the Commission will allow when justified in the context of individual declaratory orders or Section 205 filings by public utilities under the FPA.”¹⁴¹ Although the Commission has been offering transmission rate incentives for several years on a case-by-case basis consistent with an earlier proposed policy statement,¹⁴² and pursuant to its general policy on transmission pricing,¹⁴³ Order No. 679 offers public utilities certain incentives that the Commission had not permitted in the past and reflects a “willingness to consider much greater flexibility with respect to the nature and timing of rate recovery for needed transmission infrastructure.”¹⁴⁴

To obtain approval for one or more incentives,¹⁴⁵ a public utility will need to demonstrate that: the transmission project for which incentives are sought will either ensure reliability or reduce the cost of delivered power by reducing transmission congestion; that there is a nexus between the incentive sought and the investment being made; and that resulting rates are just and reasonable.¹⁴⁶

As a whole, the goal of FPA section 219 is consistent with the goals of section 217(b)(4). Section 219 is generally intended to facilitate the expansion of the transmission system by increasing financial incentives for investment in transmission infrastructure. The two, however, do not entirely overlap. FPA

138. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1241, 119 Stat. 594, 961, *adding* FPA § 219.

139. *Id.*

140. Order No. 679, *supra* note 59.

141. *Id.* at P 1.

142. *Proposed Pricing Policy for Efficient Operation and Expansion of Transmission Grid*, 102 F.E.R.C. ¶ 61,032 (2003) (superseded by Order No. 679).

143. *Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act; Policy Statement*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,005, 31,144 (1994), 59 Fed. Reg. 55,031 (1994).

144. Order No. 679, *supra* note 59, at P 1.

145. Some of the incentives for which public utilities may apply include: 100% of prudently incurred construction work in progress (CWIP) in rate base; recovery of prudently incurred pre-commercial costs; use of a hypothetical capital structure; accelerated depreciation; and a rate of return at the high end of zone of reasonableness. 18 C.F.R. § 35.35(d)(1) (2006). The Commission also provided for incentives for joining or transferring assets to a Transco and incentives for participating in an RTO. 18 C.F.R. §§ 35.35(d)(2), 35.35(e) (2006). Pursuant to specific direction in FPA section 219, the Commission also provided for recovery of prudently incurred costs necessary to comply with reliability standards under FPA section 215 and prudently incurred costs related to transmission infrastructure development pursuant to FPA section 216 (relating to Commission siting of transmission in National Interest Electric Transmission Corridors).

146. 18 C.F.R. § 35.35(d) (2006).

section 219 directs the Commission to establish incentives to promote those transmission investments that will ensure reliability and reduce the cost of delivered power for transmission customers generally.¹⁴⁷ FPA section 217(b)(4) directs the Commission to exercise its authority under the FPA as a whole to facilitate planning and expansion of the transmission system to meet the long-term needs of LSEs.¹⁴⁸ While Order No. 679 makes a conscientious effort to address the broad goals of section 219, it does not appear that Order No. 679 was developed with the more specific goals of section 217(b)(4) in mind.

1. Transmission Planning

In response to the Commission's Notice of Proposed Rulemaking on Transmission Incentives,¹⁴⁹ several commenters asked the Commission to offer incentives under FPA section 219 only for those transmission investments that arose out of open and inclusive joint transmission planning processes that included all LSE transmission customers in the region. Such a condition, those commenters argued, was necessary for the incentives (1) to be just and reasonable and not unduly discriminatory and (2) for the incentives to promote those transmission investments that most efficiently met the needs of all LSEs.¹⁵⁰ In Order No. 679, the Commission agreed with commenters that "regional planning processes can provide an efficient and comprehensive forum through which those seeking to make transmission investments can have their projects evaluated to see if they meet the requirements of Section 219."¹⁵¹ The Commission also adopted a rebuttable presumption that transmission projects arising from such a planning process will ensure reliability or reduce congestion, as required by section 219. The Commission declined, however, to require participation in an open and inclusive regional planning process as a precondition for obtaining incentives.¹⁵²

The Commission's explanation for its decision was simply that "Section 219 does not require such a precondition."¹⁵³ The Commission did not address the question whether planning was necessary for incentives to be just and reasonable and not unduly discriminatory even though the Commission concluded only seven months later that sections 205 and 206 required all public utilities to participate in open and inclusive regional planning processes.¹⁵⁴

The Commission also did not explore the interaction between section 219 and section 217(b)(4). Rather than asking whether it had the authority (or obligation) under sections 217(b)(4), 205, and 206 to use transmission incentives to promote planning to meet the long-term needs of LSEs, the Commission instead chose to focus on the narrow question whether section 219 itself required

147. Energy Policy Act of 2005 § 1241, adding FPA § 219.

148. *Id.* § 1233(a), adding FPA § 217(b)(4).

149. Notice of Proposed Rulemaking, *Promoting Transmission Investment through Pricing Reform*, [2005 Proposed Regs.] F.E.R.C. STATS. & REGS. ¶ 32,593, 70 Fed. Reg. 71,409 (2005).

150. *See, e.g.*, Comments of the National Rural Electric Cooperative Association on Notice of Proposed Rulemaking, *Promoting Transmission Investment through Pricing Reform*, Docket No. RM06-4-000, at 8, 19 (F.E.R.C. Jan. 11, 2006). *See also*, Order No. 679, *supra* note 59, at P 45.

151. *Id.* at P 58.

152. Order No. 679-A, *supra* note 59, at P 111.

153. Order No. 679, *supra* note 59, at P 58.

154. Order No. 890, *supra* note 13, at PP 418-561.

planning. That was not what Congress had in mind when it drafted section 217(b)(4). By its own language, section 217(b)(4) applies to every section of the FPA. The Commission should have declined to use Order No. 679 as an opportunity to promote the goals of section 217(b)(4) only if section 219 specifically prohibited it in that context.

In fact, section 219 gives the Commission significant discretion to define when incentives are appropriate. In particular, section 219(d) requires that all rates adopted pursuant to the section comply with the requirements of section 205 and 206 “that all rates, charges, terms and conditions be just and reasonable and not unduly discriminatory”¹⁵⁵ Even though an incentive rate might promote investment in transmission that improves reliability and reduces congestion, the Commission not only may, but must reject it if it would otherwise be unjust, unreasonable, or unduly discriminatory or preferential. Given the manner that section 217(b)(4) instructs the Commission to read those words, the Commission could easily have found that incentives are unjust, unreasonable, unduly discriminatory, or preferential if they do not promote planning and expansion of the transmission grid for a specific purpose, i.e., to meet the long-term needs of all LSEs.¹⁵⁶

The shortcomings in the Commission’s approach to incentive rates discussed above are apparent in the Commission’s order approving incentive rate treatment for a transmission expansion that American Electric Power (AEP) proposed within the PJM footprint.¹⁵⁷ AEP sought approval of an enhanced return on equity, current recovery of costs incurred prior to operation of the new transmission project, and recovery of CWIP.¹⁵⁸ The Commission issued a declaratory order approving the incentives requested by AEP over the opposition of several interveners.

In one fairly remarkable line from the AEP Rehearing Order, the Commission states: “we note that the Commission’s approval of incentives for the proposed Project is based on the assumption that the proposed Project *will* result from the PJM regional planning process, and therefore we have no basis to conclude that costs will not be prudently incurred.”¹⁵⁹ AEP had not yet even submitted its plan to PJM for consideration within the Regional Transmission Expansion Planning (RTEP) process.¹⁶⁰ AEP apparently intended to prepare its own Project proposal and then submit it to the RTEP process as a *fait accompli*. The proposal could not, therefore, have taken into account the interests of other

155. Section 219 also states that the purpose of section 219 is to “benefit[] consumers,” to promote “economically efficient” transmission, and to encourage deployment of transmission technologies to “increase the capacity and efficiency” of the grid. Energy Policy Act of 2005 § 1241, *adding* FPA § 219. The Commission could certainly have concluded, particularly in light of section 217(b)(4), that an open and inclusive transmission planning process is required to ensure that new transmission will adequately “benefit” consumers and promote sufficiently “efficient” investment.

156. Unfortunately, the Commission chose to read section 219(d) as a requirement merely to ensure that the rate of return provided by an incentive rate falls within the zone of reasonableness. In so doing, it ignored decades of precedent defining “just and reasonable” as requiring far more. *See, e.g.*, Order No. 679-A, *supra* note 59, at P 38.

157. *American Elec. Power Serv. Corp.*, 116 F.E.R.C. ¶ 61,059 (2006), *order on reh’g* 118 F.E.R.C. ¶ 61,041 (2007) [*AEP Order on Reh’g*].

158. *Id.* at P 2.

159. *AEP Order on Reh’g*, *supra* note 157, at P 28 (emphasis added).

160. *Id.* at PP 1, 3.

LSEs in the region and could not have been designed so as to enable those other LSEs to obtain the long-term transmission rights they need to serve their consumers. The Commission was willing to rely on the pro forma assertion that the plan would be approved by PJM, over the objections of the very consumer representatives and LSEs by and for which the facility should have been planned.

2. LSEs

Section 219 calls on the Commission to promote reliable and economically efficient transmission and generation of electricity by providing incentives for transmission investments that ensure reliability or lower the delivered cost of power by reducing congestion. Arguably, therefore, section 219 does not distinguish between transmission investments required by LSEs and those requested by any other transmission provider or transmission customer. Section 217(b)(4), however, requires the Commission to pay particular attention to the need to facilitate planning and expansion of the transmission system to meet the long-term needs of LSEs whenever the Commission exercises its authority under the FPA, including under FPA section 219. Order No. 679, however, addresses only the broad goal stated in section 219 and does not address the more specific goals stated in section 217(b)(4). Order No. 679 neither limits incentives to those projects that meet the long-term needs of LSEs nor provides any additional incentives to those projects. Further, Order No. 679 does not require an analysis to determine whether a proposed project could meet the long-term needs of additional LSEs with even limited adjustments. A public utility may receive the same incentives under Order No. 679 if its transmission project lowers the cost of service only to that utility's own bundled retail native load as it would receive if the same project were planned and designed only a little differently so as to meet the needs of all LSEs within the region. In fact, nothing in the process Order No. 679 establishes for granting incentive rates requires the Commission to determine whether the project for which incentives are sought improve reliability and reduces congestion for one public utility's customers at the expense of decreased reliability or increased congestion for another LSE's customers.

The Commission was given several opportunities to consider the difference between these two approaches. The first was already discussed above. That was the question whether the Commission would require applicants for incentive rates to demonstrate that their projects arose from open and inclusive regional transmission planning processes—processes that include all LSEs—before qualifying for incentives. The second major opportunity to address this question arose in the context of Order No. 679's rebuttable presumptions. In Order No. 679, the Commission adopted a rebuttable presumption that a transmission project that receives state siting approval qualifies for incentives under section 219. In response, several commenters expressed concern that state siting processes are generally concerned with protecting ratepayers within the state and do not address the interests of LSEs outside the state.¹⁶¹ On rehearing, the Commission entirely ducked the issues raised by section 217(b)(4). The Commission did not at all address the concern that the state might consider the

161. See Order No. 679-A, *supra* note 59, at P 43.

interests of a single regulated LSE that serves consumers in the state, but might ignore or actually be adverse to the interests of unregulated LSEs in the state and LSEs that rely on the transmission system but serve consumers outside the state.

F. Market-Based Rates

The FPA requires that public utilities sell power at wholesale at rates that are just and reasonable and not unduly discriminatory or preferential.¹⁶² While the Commission traditionally regulated wholesale rates to ensure that they remained lawful, both judicial and Commission precedent explain that the Commission may rely on well functioning markets in lieu of regulation to keep a public utility's rates just and reasonable, as long as the public utility either lacks market power or has had its market power sufficiently mitigated.¹⁶³ In June 2007, the Commission issued a long awaited¹⁶⁴ final rule, Order No. 697, adopting tests that it will use to determine whether public utilities lack market power and thus are entitled to sell power at wholesale at market-based rates.¹⁶⁵ Order 697 also finally settles the approaches it will take for mitigating market power or imposing alternative regulatory schemes where market power exists.¹⁶⁶

In Order No. 697, the Commission adopted two indicative screens for determining whether an applicant for market-based rates has generation (also called "horizontal") market power. If an applicant passes both screens—the uncommitted pivotal supplier analysis and the uncommitted market share analysis—the applicant is rebuttably presumed to lack generation market power. If an applicant fails either screen, the applicant is rebuttably presumed to have generation market power. The applicant then has the option of using the more complex delivered price test to demonstrate that it lacks generation market

162. Federal Power Act §§ 205-206, 16 U.S.C. §§ 824d-824e (2000).

163. *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1994); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 871 (D.C. Cir. 1993), *remanded by* *North Carolina Utils. Comm'n v. FERC*, 310 U.S. App. D.C. 13 (D.C. Cir. 1994); *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *see also* *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (*reh'g* pending); *Electricity Consumers Res. Council v. FERC*, 747 F.2d 1511, 1517-1518 (D.C. Cir. 1984); *Farmers Union Cent. Exch. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984). *But see* *Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007) (petitioner arguing that the Commission lacks authority to approve market-based rates in the first instance).

164. This issue has a long history. In November 2001, the Commission announced a new market power screen for generation, the Supply Margin Assessment, to be applied to market-based rate applications on an interim basis pending a generic review of new methods for analyzing market power and established mitigation measures applicable to entities that fail the SMA screen. *AEP Power Marketing, Inc.*, 97 F.E.R.C. ¶ 61,219 (2001). In August 2002, the Commission issued a Notice of Request for Written Comments on Supply Margin Assessment Screen in *Conference on Supply Margin Assessment*, Docket No. PL02-8-000. In April 2004, the Commission addressed rehearing requests of its earlier order and adopted a new interim generation market power analysis. *AEP Power Marketing, Inc.*, 107 F.E.R.C. ¶ 61,018, *order on reh'g*, 108 F.E.R.C. ¶ 61,026 (2004). In the MBR NOPR, issued in May 2006, the Commission proposed to codify (and modify in certain respects) its generation market power analysis and the other aspects of its market-based rate analysis.

165. Order No. 697, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, F.E.R.C. STATS. & REGS. 31,252 (2007), 72 Fed. Reg. 39,904 (2007) [hereinafter Order No. 697].

166. *See id.* at PP 604-1133. Prior to Order No. 697, the Commission's mitigation approach was exemplified by *Energy Services, Inc.*, 119 F.E.R.C. ¶ 61,084 (2007) (accepting cost-based rate tariffs).

power; proposing a plan to mitigate its market power; or, accepting cost-based rates.¹⁶⁷

One of the first steps required for both screens is for the applicant to define the appropriate market for analysis.¹⁶⁸ Under the uncommitted pivotal supplier test, the applicant must then demonstrate that its uncommitted generation within the relevant market is less than the net uncommitted supply in the market at the time of annual peak load.¹⁶⁹ Under the market share analysis, the applicant must demonstrate that it has less than a 20% market share in the relevant market for all seasons.¹⁷⁰

The application of each of these screens is fairly complex and largely beyond the scope of this article. Nevertheless, there are some elements of the Commission's approach that are relevant to section 217(b)(4) because they affect the degree to which applicants for market-based rate authority would have an incentive to plan and expand the transmission system to meet the long-term needs of other LSEs.

First, the Commission considerably narrowed the process of establishing the relevant market for analysis. Typically, markets are defined geographically, temporally, and by the product or service being offered.¹⁷¹ An entity that has market power in one region, during one season, or for one product may not have market power with respect to other products, during another season, or in another geographic area.

With respect to temporal and product markets, however, the Commission asked applicants to provide analyses only for relatively short-term energy, capacity, and ancillary services markets. Despite requests from commenters, the Commission expressly declined to require separate analyses for long-term energy and capacity markets. Instead, the Commission assumed without analysis that if the transmission system (and other market conditions) were adequate to enable energy markets to operate competitively in the short term, then the transmission system (and other market conditions) must also be adequate to enable longer-term markets, capacity markets, and ancillary service markets to operate competitively.¹⁷²

In one particularly clear example of the Commission's short-term focus, the Commission rejected commenters' request that applicants for market-based rates analyze the effect that reasonably known and measurable changes from the conditions in the test year, such as the imminent expiration of long-term wholesale power contracts, would have on the results of the screens.¹⁷³ If a contract's term ends outside of the analysis period employed by the applicant (even by a month or year), then the applicant's capacity freed up by the end of

167. Order No. 697, *supra* note 165, at PP 12-22.

168. *Id.* at PP 15, 215.

169. Order No. 697, *supra* note 165, at PP 35, 143.

170. *Id.* at PP 34, 125.

171. DEP'T OF JUST., HORIZONTAL MERGER GUIDELINES §§ 1, 1.2 (1997) <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

172. Order No. 697, *supra* note 165, at P 122 (Finding that, "absent entry barriers, long-term capacity markets are inherently competitive because new market entrants can build alternative generating supply."). Given the significant challenges utilities and IPPs face siting and building new base load resources (and in some areas the difficulty building anything) this assumption is simply unjustifiable.

173. *Id.* at PP 17, 301.

the contract is not included in the applicant's uncommitted supply for purposes of either screen. The screen, therefore, will fail to identify applicants' market power in forward markets. The screen does not recognize that the wholesale customers must seek new generation capacity before their existing supply contracts expire—and thus before applicants must report changes and perform updated market power analyses. Nevertheless, the wholesale customers will be seeking new contracts for a future period in which the transmission providers could well have significant market power.

Second, the Commission also significantly abbreviated the process of determining the appropriate geographic market for analysis. With very limited exceptions, applicants within RTOs are directed to use the entire RTO as the market for analysis.¹⁷⁴ Applicants outside of RTOs are directed to use their balancing areas as the appropriate market for analysis.¹⁷⁵ Both of these generic presumptions are seriously flawed. While the screens might indicate that an applicant for market-based rates lacks market power in an RTO or a balancing area, transmission constraints may in fact give that applicant significant market power in localized load pockets within the broader area. In its NOPR, the Commission itself recognized that “binding transmission constraints [within RTOs] prevent some potential suppliers from selling into the destination market.”¹⁷⁶ Commenters argued strenuously that the same is true within individual control areas.¹⁷⁷

The Commission recognized that there could be instances in which its presumptions concerning the geographic scope of markets could be inaccurate. Accordingly, it will permit applicants to propose alternative (presumably broader) markets provided they also applied the screens to the presumptive markets.¹⁷⁸ The Commission also permits interveners to argue that the applicants hold market power in smaller markets.¹⁷⁹ However, the Commission put the burden on the interveners to prove that screens should be applied in the smaller markets even though the interveners would be at an enormous disadvantage due to time limitations in the Commission's process and because of the challenges of getting the information needed to meet that burden from the applicants.

174. Order No. 697, *supra* note 165, at PP 215-1133. The Commission did make an exception for the limited number of load pockets that the Commission has already found in merger cases to exist within the RTOs. *Id.* at P 231. The Commission could hardly have refused to provide that exception as it has already made factual findings on the record that those load pockets exist. It defies reason, however, for the Commission to assume that no load pockets exist in either RTOs or individual balancing areas other than those it has already identified in the context of individual merger cases.

175. Order No. 697, *supra* note 165, at P 232.

176. MBR NOPR, *supra* note 62, at P 61; *see also id.* at n.60 (listing examples of submarkets).

177. Order No. 697, *supra* note 165, at PP 216-229; *see, e.g.*, Supplemental Comments of the National Rural Electric Cooperative Association, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Docket No. RM04-7-000 (F.E.R.C. Aug. 10, 2006). Many if not most control areas have known load pockets within them because a vertically integrated monopoly public utility (1) determined it was easier or more profitable to build generation near load rather than transmission, and (2) did not want to give captive wholesale customers access to transmission required to reach alternative generation supplies. This is the result of a system design from an earlier regulatory regime.

178. Order No. 697, *supra* note 165, at P 233.

179. *See id.*

By adopting the market definitions that it did, the Commission ignored Congress' instruction that it exercise all of its authority under the FPA, including its authority to grant or deny market-based rates, in a way that meets the long-term transmission needs of LSEs. Rather than require a careful analysis in MBR proceedings of the transmission system's ability to serve the long and short term needs of LSEs in various markets, the Commission adopted assumptions that allowed it to avoid that analysis. And, where questions arose concerning the system's ability to meet the needs of LSEs, the Commission put the burden on LSE transmission customers, rather than applicants to demonstrate the correct markets for analysis.

By avoiding a proper analysis of geographic, temporal, and product markets, and by shifting the burden of proof to intervenors, the Commission makes it considerably more likely that MBR applicants will be able to obtain MBR authority without planning and expanding their transmission systems in a manner that truly enables LSEs to obtain long-term transmission service they need to meet their needs (at just and reasonable rates) in all markets. Were the Commission instead to require a detailed market analysis that highlighted transmission system inadequacies, those applicants that wanted market-based rates would have a strong incentive to address those inadequacies and make the needed improvements.¹⁸⁰

G. Transmission Siting Final Rule (Order No. 689)

On November 16, 2006, the Commission issued Order No. 689, promulgating Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities.¹⁸¹ The regulations provide the Commission's filing requirements and procedures for any entity that wishes for Commission approval to construct electric transmission facilities pursuant to FPA section 216.¹⁸² The regulations also explain how the Commission will coordinate the processing of federal authorizations and environmental review for applications to construct transmission within Department of Energy (DOE)-designated national interest electric transmission corridors.¹⁸³

These regulations implement two provisions of the EPAct'05. One provision, not as relevant for this analysis, requires the DOE to act as lead agency for coordinating federal reviews and approvals for transmission facilities.¹⁸⁴ The DOE delegated a portion of that authority to the Commission.¹⁸⁵ The second provision provides the Commission with new authority under the FPA to issue permits for the construction or modification of transmission facilities located within DOE-designated "National Interest Electric

180. Of course, this analysis would have an added benefit. The Commission would be able to ensure just and reasonable rates by denying MBR authority to those utilities that chose not to address the inadequacies in their transmission systems.

181. Order No. 689, *supra* note 60.

182. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1221, 119 Stat. 594, 949 (2005), *adding* FPA § 216.

183. Order No. 689, *supra* note 60, at PP 6, 45.

184. Energy Policy Act of 2005 § 1221(h).

185. Order No. 689, *supra* note 60, at P 7.

Transmission Corridors” (NIETCs), if the Commission makes certain statutory findings.¹⁸⁶ In relevant part, those statutory findings are that:

- (1)(A) a State in which the transmission facilities are to be constructed or modified does not have authority to—
 - (i) approve the siting of the facilities; or
 - (ii) consider the interstate benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State;
- (B) the applicant for a permit is a transmitting utility under this Act but does not qualify to apply for a permit . . .
- (C) a State commission or other entity that has authority to approve the siting of the facilities has—
 - (i) withheld approval for more than 1 year after the filing of an application . . . ; or
 - (ii) conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible; . . .
- (3) the proposed construction or modification is consistent with the *public interest*;
- (4) the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protects or *benefits consumers*;
- (5) the proposed construction or modification is *consistent with sound national energy policy* and will enhance energy independence; and
- (6) the proposed modification will maximize, to the extent reasonable and economical, the transmission capabilities of existing towers or structures.¹⁸⁷

The subject matter of Order No. 689—providing a federal backstop process for siting transmission facilities—makes it a natural fit with FPA section 217(b)(4). Just by implementing FPA section 216, the Commission cannot help but facilitate the expansion of the transmission system. Even if the federal siting process is never used, its mere existence will encourage states to act expeditiously on siting applications that would otherwise qualify for federal siting.

If states do not approve siting requests within one year, the process established in Order No. 689 has been proven to work well in other contexts. That process largely tracks the processes the Commission has long had in place for siting gas pipelines and transmission facilities required for Commission-licensed hydroelectric facilities.¹⁸⁸ Further, once the Commission issues a permit, the permit-holder has the right to exercise eminent domain if needed.¹⁸⁹ The federal permit also gives the holder some assurance of cost recovery.¹⁹⁰

FPA section 217(b)(4), however, does not just require the Commission to facilitate expansion of the transmission system for its own sake. Rather FPA section 217(b)(4) requires the Commission to exercise its authority under the FPA, including FPA section 216, to facilitate planning and expansion of the transmission system for a specific purposes: to meet the long-term needs of LSEs.

That more specific purpose might be difficult to pursue in the context of FPA section 216 if the Commission were required to grant permits to all

186. Energy Policy Act of 2005 § 1221.

187. *Id.* § 1221(a), *adding* FPA § 216(b) (emphasis added).

188. 18 C.F.R. § 157 (2006).

189. Energy Policy Act of 2005 § 1221(a), *adding* FPA § 216(e).

190. *Id.* § 1241, *adding* FPA § 219(b)(4)(B) (stating that the Commission shall by rulemaking allow the recovery of “all prudently incurred costs related to transmission infrastructure development pursuant to section 216.”).

applicants. As noted above, however, FPA section 216, requires the Commission to make several findings before approving federal permits. And, those required findings provide the Commission with a great deal of discretion to condition its approval of permits in a manner that implements Congress' goals in section 217(b)(4). The Commission can and—in light of section 217(b)(4)—should have defined “the public interest” and “sound national energy policy” so as to target federal siting assistance in a manner that encourages the transmission system to be planned and expanded to “meet the reasonable needs of load-serving entities” and to “enable[] load-serving entities to secure firm transmission rights . . . on a long-term basis for long-term power supply arrangements”¹⁹¹

This article does not mean to suggest that the Commission would have to deny siting approval to system improvements that do not meet the goals of section 217(b)(4). There may well be meritorious upgrades that qualify under section 216 that are not needed to meet the long-term needs of LSEs. Without incorporating section 217(b)(4) into its analysis under section 216, however, the Commission may approve upgrades that either could have been altered slightly through a proper joint planning process to serve both the interests for which it was proposed and the long-term needs of LSEs. In that situation, the Commission would not only have failed to meet its section 217(b)(4) obligation to facilitate planning and expansion to meet the needs of LSEs, it would have actually undermined the interests protected by section 217(b)(4). Having approved one system improvement—particularly one that was politically challenging enough to require federal interference—the Commission will have made it far more difficult for an LSE to obtain siting approval for the additional upgrade in the same region needed to meet those of its needs that were not addressed by the facility the Commission approved. It is much easier to site one line that meets multiple needs than it is to site more than one line, each of which serves only one utility's customers. In some cases, the situation could be even worse. The upgrade that the Commission approves without consideration of the needs of other LSEs could not only fail to address those LSEs' needs, it could actually diminish the quality of service those LSEs receive by creating loop flow or congestion on other facilities on which those LSEs rely.

Despite these risks, the Commission failed to incorporate the goals Congress enunciated in FPA section 217(b)(4) into Order No. 689. The Commission did not define the terms in sections 216(b)(2)-(6) by reference to the long-term needs of LSEs. The Commission rejected without explanation the commenters' requests that the Commission consider in evaluating applications whether the proposal arose from a planning process that considered the long-term needs of LSEs. In fact, the Commission failed to reference FPA section 217(b)(4) at all. Instead, the Commission decided that “[i]n reviewing a proposed project, the Commission will consider all relevant factors presented on a case-by-case basis and balance the public benefits against the potential adverse consequences.”¹⁹²

191. Energy Policy Act of 2005 § 1233(a), adding FPA § 217(b)(4).

192. Order 689, *supra* note 60, at PP 43-44.

III. CONCLUSION AND RECOMMENDATIONS

To transmission dependent LSEs, the EPAct'05 appeared to promise relief from a long-term challenge: the need to obtain reliable access to low-cost energy resources for their retail consumers. Even though the EPAct'92 and Order No. 888 promised open-access to the transmission grid, transmission-dependent LSEs continued to be stymied by a number of problems, including: the well-documented inadequacies of the transmission infrastructure;¹⁹³ undue discrimination in the transmission planning process;¹⁹⁴ and by a mismatch between the short-term transmission rights in organized markets and their need for long-term price certainty.¹⁹⁵ At least to some degree, each those problems, however, could be mitigated if the Commission were to:

exercise the authority of the Commission under this Act in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligation of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.¹⁹⁶

With such transmission rights, the transmission dependent LSEs would be far better able to meet their obligations to their consumers.

As the discussion above illustrates, however, the Commission has not effectively internalized the industry vision Congress codified in section 217(b)(4). The Commission directly addressed section 217(b)(4) in only two orders. In one, Order No. 681, the Commission had no choice. Congress had specifically required the Commission to issue an order within one year of enactment to implement section 217(b)(4) within RTO regions. In the other, Order No. 890, the Commission did consider the extent to which section 217(b)(4) affected the manner in which the Commission implements some of its authority. Yet, even in these two Orders, the Commission failed to fully embrace the new vision. In all of the other Orders reviewed in this article, the Commission ignored section 217(b)(4) altogether.

This does not mean that the Commission did not take any steps in the two years following the EPAct'05 to facilitate the planning and expansion of the transmission system. Of course it did. Nor does it mean that the Commission was unconcerned about the long-term needs of LSEs. It demonstrated several times that it recognized those needs. The Commission did take a number of concrete steps that were consistent with the Congressional goals codified in section 217(b)(4).

What it does mean, however, is that the Commission missed many opportunities to pursue those goals. Where the Commission facilitated planning and expansion of the transmission system, it was not focused effectively to meet the long-term needs of all LSEs. Where the Commission acted to meet the needs

193. See, e.g., U.S. DEP'T OF ENERGY, NATIONAL ELECTRIC TRANSMISSION CONGESTION STUDY (2006), http://www.oe.energy.gov/DocumentsandMedia/Congestion_Study_2006-10.3.pdf; Notice and Opportunity for Written and Oral Comment, *Office of Electricity Delivery and Energy Reliability; Draft National Interest Electric Transmission Corridor Designations*, 72 Fed. Reg. 25,838 (2007).

194. See Order No. 890, *supra* note 13, at PP 26-70.

195. See Order No. 681, *supra* note 20, at PP 6-10.

196. Energy Policy Act of 2005 § 1233(a), adding FPA § 217(b)(4).

of LSEs, it did not always put the LSEs' long-term needs ahead of the Commission's competing interest in pursuing short-term markets. In too many cases, the Commission stopped short of meeting the goals of section 217(b)(4). This failure demonstrates that section 217(b)(4) was not sufficiently front-and-center in the Commission's thinking process when it addressed other sections of the FPA.

Fortunately, there are two steps the Commission can take to remedy past inadequacies and to prevent the problem from arising in the future. As to past actions, the Commission should open a docket for the review of all of its current policies including those discussed above to determine whether they can be amended to better implement Congress's directive in section 217(b)(4). The discussion above should provide the Commission with a useful starting point for that analysis.

As to the future, the last pages of every Commission order are always filled with an Information Collection Statement, required by the Office of Management and Budget and the Paperwork Reduction Act of 1995;¹⁹⁷ an Environmental Analysis, required by the National Environmental Policy Act;¹⁹⁸ and a Regulatory Flexibility Act Analysis Certification required by the Regulatory Flexibility Act.¹⁹⁹ In each of these sections, the Commission is forced to conduct an analysis to ensure that the Order complies with certain federal goals and requirements.

The Commission should recognize that it has not been doing a sufficient job of incorporating section 217(b)(4) into its analysis in individual orders and it should voluntarily impose on itself a similar obligation to analyze each and every order it issues in exercising its authority under the FPA. That analysis would examine the extent to which the Commission, in drafting the order, has exercised its authority consistent section 217(b)(4)'s two directives. In the order, has the Commission facilitated the planning and expansion of transmission facilities to meet the reasonable needs of LSEs? Has the Commission drafted the order in a manner that will enable LSEs to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs? The Commission should continue to conduct that explicit analysis at the end of every order under the FPA until Congress's goals have been internalized and have become the Commission's own.

197. Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (1995) (codified at 44 U.S.C. §§ 3501-3520 (2000)).

198. The National Environmental Policy Act of 1969, Pub. L. 91-190 (Jan. 1, 1970), *as amended* by Pub. L. 94-52 (July 3, 1975), Pub. L. 94-83 (Aug. 9, 1975), and Pub. L. 97-258, § 4(b) (Sept. 13, 1982) (codified at 42 U.S.C. §§ 4321-4347 (2000)).

199. Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (2000).