

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

Modification of Interchange and Transmission ) Docket No. RM08-7-002  
Loading Relief Reliability Standards; and Electric )  
Reliability Organization Interpretation of Specific )  
Requirements of Four Reliability Standards )

**REQUEST FOR REHEARING AND CLARIFICATION OF THE NRG COMPANIES,  
THE ELECTRIC POWER SUPPLY ASSOCIATION, AND CONSTELLATION  
ENERGY COMMODITIES GROUP**

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2008), the NRG Companies ("NRG"),<sup>1</sup> the Electric Power Supply Association ("EPSA"), and Constellation Energy Commodities Group, Inc. ("CECG") (collectively, "Rehearing Parties") respectfully request rehearing and clarification of Order No. 713-A,<sup>2</sup> issued on March 19, 2009 ("TLR Order"). The TLR Order erred by accepting Reliability Standard IRO-006-4, as proposed by the North American Electric Reliability Corporation ("NERC"), despite evidence that the proposed Reliability Standard is not just and reasonable, is unduly discriminatory and results in violations of the Commission's *pro forma* Open Access Transmission Tariff.

**I. INTRODUCTION**

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<sup>1</sup> The NRG Companies are Arthur Kill Power LLC, Astoria Gas Turbines Power LLC, Bayou Cove Peaking Power LLC, Big Cajun I Peaking Power LLC, Cabrillo Power I LLC, Cabrillo Power II LLC, Conemaugh Power LLC, Connecticut Jet Power LLC, Devon Power LLC, Dunkirk Power LLC, El Segundo Power, LLC, Huntley Power LLC, Indian River Power LLC, Keystone Power LLC, Long Beach Generation LLC, Louisiana Generating LLC, Middletown Power LLC, Montville Power LLC, NEO California Power LLC, NEO Freehold-Gen LLC, Norwalk Power LLC, NRG Energy Center Dover LLC, NRG Energy Center Paxton LLC, NRG Power Marketing, Inc., NRG Rockford LLC, NRG Rockford II LLC, NRG Sterlington Power LLC, Oswego Harbor Power LLC, Somerset Power LLC, Vienna Power LLC, and West Coast Power LLC.

<sup>2</sup> *Modification of Interchange and Transmission Loading Relief Reliability Standards; and Electric Reliability Organization Interpretation of Specific Requirements of Four Reliability Standards*, 126 FERC ¶ 61,252 (2009).

Section 215 of the Federal Power Act (“FPA”) directs the Commission to evaluate mandatory Reliability Standards under the “just and reasonable” and “not unduly discriminatory or preferential” and “public interest” standards set forth by the FPA.<sup>3</sup> Further, Section 215 specifically charges the Commission to independently evaluate the affect of proposed Reliability Standards on competition, and states that the Commission is not permitted to defer to NERC on competition issues.

The Commission’s TLR Order, however, fails to apply the just and reasonable test, and fails to reject the proposed TLR standard as unduly discriminatory or preferential, despite substantial record evidence that the proposed TLR Reliability Standard:

- Violates the Commission’s *pro forma* transmission tariff by allowing Reliability Coordinators to curtail firm transactions prior to requiring the curtailment of all non-firm service over the same interfaces or flowgates;
- Harms competition by providing an undue preference for network native load transactions, which are not subject to curtailment on an equivalent basis; and
- Fails to mitigate the overuse of TLRs to solve chronic and routine congestion problems.

The result is that the TLR Reliability Standard is not in the public interest and discriminates in favor of transactions made by a Load Serving Entity over transactions entered into by an otherwise similarly situated Transmission Dependant Utility (“TDU”) or merchant generator.

Further, while the TLR Order acknowledges the validity of the concerns raised by NRG and the other Rehearing Parties, the Order then proceeds to find the proposed standard just and reasonable, and in the public interest. This represents a failure of reasoned decision making and violates Section 215’s requirement that the Commission evaluate a proposed Reliability Standards on both reliability and competitive grounds.

## **II. SPECIFICATIONS OF ERROR AND STATEMENT OF ISSUES**

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<sup>3</sup> 16 U.S.C. § 824o (2008).

Pursuant to Rules 203(a)(7) and 713(c)(1), 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(1)

(2008), the Rehearing Parties present the following identification of errors and statement of

issues:

- The TLR Order failed to consider the impact of the proposed standard on markets and competition, as required by Section 215 of the Federal Power Act.

16 U.S.C. § 824o (2008); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *reh'g denied*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in 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); *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*; Order No. 672 (2006).

- The TLR Order erred in finding that the TLR Reliability Standards were just and reasonable, not unduly discriminatory or preferential, and in the public interest, despite evidence that the proposed standard violates the curtailment priority established by the *pro forma* tariff.

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999); *Northeast Energy Assoc. v. FERC*, 158 F.3d 150 (D.C. Cir. 1998); *Mississippi Valley v. FERC*, 659 F.2d 488 (5th Cir. 1981); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, III FERC Stats. & Regs., Regs. Preambles ¶ 31,131 (2007); *North American Electric Reliability Council*, 85 FERC ¶ 61,353 (1998).

- The TLR Order failed to adequately justify the Commission's departure from its prior holding that NERC's TLR procedures must end undue discrimination against interchange transactions.

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999); *Northeast Energy Assoc. v. FERC*, 158 F.3d 150 (D.C. Cir. 1998); *Mississippi Valley v. FERC*, 659 F.2d 488 (5th Cir. 1981); *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, III FERC Stats. & Regs., Regs. Preambles ¶ 31,131 (2007); *North American Electric Reliability Council*, 85 FERC ¶ 61,353 (1998).

- The TLR Order is arbitrary and capacious, and fails to exercise reasoned decision making because it accepts the proposed standard, even while acknowledging that the

proposed standard results in arbitrary curtailments of firm transactions.

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); 16 U.S.C. § 810o(d) (2008).

- The TLR Order unlawfully defers to the NERC process on competition issues and fails to exercise its independent assessment of whether the NERC proposal is just and reasonable and not unduly discriminatory.

16 U.S.C. § 824o(d) (2008); *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*; Order No. 672 (2006).

- The TLR Order violates Section 215 by failing to remand an unlawful standard back to NERC.

16 U.S.S. § 810o(d) (2008); 16 U.S.C. § 824o(d)(5) (2008); 16 U.S.C. § 824o(f) (2008).

At a minimum, the Commission should clarify that the TLR Order directs NERC to revise the TLR Reliability Standard to address the issues raised by the Rehearing Parties pursuant to Section 215(d)(5) of the FPA. Alternatively, we request rehearing of the Commission's failure to issue such a directive.

## **II. REQUEST FOR REHEARING AND CLARIFICATION**

### **A. The FPA Requires the Commission to Find a Proposed Reliability Standard Just and Reasonable, and Not Unduly Discriminatory or Preferential.**

The TLR Order erred in accepting NERC's proposed mandatory Reliability Standard despite substantial evidence of the discriminatory impacts of the proposed standard. Section 215 of the FPA requires that the Commission ensure that proposed Reliability Standards are fair and that they do not adversely affect competition. Section 215(d) states that:<sup>4</sup>

The Commission may approve, by rule or order, a proposed reliability standard or modification to a reliability standard if it determines that the standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission shall give due weight to the technical expertise of the Electric Reliability Organization with respect to the content of a proposed standard . . . but shall not defer with respect to the effect of a standard on competition.

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<sup>4</sup> 16 U.S.C. § 824o(d) (2008).

Contrary to this statutory mandate, the TLR Order fails to apply the familiar ‘just and reasonable, and not unduly discriminatory or preferential’ standard in evaluating NERC’s proposed TLR Reliability Standard. The Commission’s finding that the proposed standard is just and reasonable is inconsistent with the record evidence that demonstrates that the application of the proposed standard violates several provisions of Order No. 888 and the *pro forma* Open Access Transmission Tariff (“OATT”), as discussed below.<sup>5</sup>

Further, the TLR Order accepted the proposed Reliability Standard without considering the impact of the proposal on competition. The effects of a proposed rate or practice on markets and competition have long informed the Commission’s analysis of whether a proposed rate complies with the “just and reasonable and not unduly discriminatory or preferential” mandate established by the Federal Power Act. Section 215 requires that mandatory Reliability Standards be subjected to the same scrutiny. Indeed, the Commission has previously held that, in reviewing a Reliability Standard, it “will ensure that a proposed Reliability Standard does not unduly favor either individual participants or certain classes of participants, as required by the statute.”<sup>6</sup>

In conflict with the holding in Order No. 672, the TLR Order rejected all comments regarding competitive concerns or whether the proposed standard results in undue discrimination as “beyond the scope of this proceeding”:

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<sup>5</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *reh’g denied*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in part and remanded in 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) (“Order No. 888”).

<sup>6</sup> *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*; Order No. 672 (2006) (“Order No. 672”).

The above comments on suggested improvements to the TLR procedure are beyond the scope of this proceeding, which pertains to the separation of business practices from the ERO's TLR procedure and implementation of the Commission's directives set forth in Order No. 693.

To the contrary, NERC has proposed to establish mandatory reliability rules governing the process by which a transmission provider curtails transactions through the TLR process in this proceeding. Because NERC presented the mandatory TLR reliability rules in this docket, there is no justification for finding that the Rehearing Parties' concerns are better addressed in some other proceeding or that the Commission is not required to address discrimination claims when approving a mandatory Reliability Standard.

Further, Section 215(d) specifically directs that the Commission "shall not defer with respect to the effect of a standard on competition."<sup>7</sup> However, there is no evidence that the Commission considered the effect of the proposed Reliability Standard on competition, and the Order instead relies on NERC's analysis of competitive issues in violation of the statute.<sup>8</sup>

The Commission's apparent position – that it is not required to address the competitive concerns raised by commenters – is inconsistent with the requirements of the Federal Power Act and warrants the grant of rehearing.

**B. The Proposed TLR Reliability Standard Violates the Curtailment Priorities Established in Order Nos. 888 and 890 and the *Pro Forma* OATT.**

The TLR standards violate the curtailment priority the Commission established in its Order Nos. 888 and 890<sup>9</sup> because it favors Native Network Load ("NNL") transactions over interchange transactions (*i.e.*, transmission service that crosses Balancing Authority boundaries)

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<sup>7</sup> 16 U.S.C. § 824o(d) (2008).

<sup>8</sup> Indeed, the word "competition" appears nowhere in the Commission's order.

<sup>9</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, III FERC Stats. & Regs., Regs. Preambles ¶ 31,131 (2007) ("Order No. 890").

when it comes to determining curtailment priorities. As explained in NRG’s prior comments,<sup>10</sup> these problems largely stem from flaws in the Interchange Distribution Calculator (“IDC”)<sup>11</sup> that the proposed Reliability Standard relies upon to determine which transmission service should be curtailed when a TLR is issued. The IDC is critical to the TLR process, because Reliability Coordinators rely on the results reached by the IDC to determine which transactions to curtail. Thus, flaws in the IDC lead to flaws in the curtailments and NNL relief obligations relied upon by Reliability Coordinators to ensure the integrity of the transmission system.

Sections 13.6 and 14.7 of the Commission’s *pro forma* OATT sets forth the following requirements for transmission service curtailment (emphasis added):

1. **Nonfirm transmission services must be curtailed before firm transmission services.** Nonfirm services are curtailed in the following order:
  - (a) nonfirm redirects of point-to-point transmission service,
  - (b) nonfirm point-to-point transmission service (with shorter duration transactions curtailed first), and
  - (c) network customer’s and transmission provider’s use of resources that are not designated as Network Resources (“Nonfirm Resources”); and
2. Firm point-to-point and network integration transmission service customers **have an equal priority** with the transmission provider’s use of the system to deliver Network Resources to its native load.

Because of its reliance on flawed output from the IDC, the TLR standard the Commission accepted in this proceeding would direct a Reliability Coordinator to curtail a “firm” interchange transaction crossing over a constrained flowgate *prior* to curtailing a non-firm NNL transaction across the same flowgate. This constitutes a direct violation of the curtailment priorities established by the OATT.

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<sup>10</sup> See, e.g., October 10, 2008 Comments of the NRG Companies, at pp. 12 – 16.

<sup>11</sup> The IDC is a mechanism the Reliability Coordinators use in the Eastern Interconnection to calculate the distribution of interchange transactions over specific flowgates or interfaces. It includes a database of all interchange transactions and a matrix of the distribution factors for the Eastern Interconnection.

The Commission has recognized that these flaws in the IDC resulted in discriminatory curtailment priorities for over a decade.<sup>12</sup> In fact, the Commission directed NERC to address these same concerns in 1998:

[W]e believe that protesters have raised concerns that warrant further action, particularly with respect to the fact that NERC's proposed TLR procedures apply only to interchange transactions (*i.e.*, transactions between systems) and not to native load or network service.

We . . . therefore direct . . . at least partial interim procedures to address this inconsistency . . . . Such modifications of NERC's proposed TLR procedures will make them further consistent with or superior to the *pro forma* open access transmission tariff.

However, the reforms made to the TLR process, and the IDC in response to the Commission's prior directives, have not remedied the discrimination the Commission previously identified, and in this proceeding has in fact elevated the rules to the status of a mandatory Reliability Standard without adequately considering the competitive impacts of its decision. The Commission's failure to explain inconsistencies between its acceptance of the proposed TLR standards in this proceeding and its finding that these same TLR standards were unduly discriminatory is legal error.<sup>13</sup>

The TLR Order thus erred in accepting the TLR standards proposed by NERC in this proceeding despite record evidence demonstrating that the standards result in violations of the *pro forma* OATT and core open access principles the Commission adopted more than a decade ago. The TLR Order's failure to remedy, or in several cases even acknowledge, these violations

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<sup>12</sup> *North American Electric Reliability Council*, 85 FERC ¶ 61,353 (1998).

<sup>13</sup> The courts require the Commission to fully explain any departure from established policy. *See, e.g., Northeast Energy Assoc. v. FERC*, 158 F.3d 150 (D.C. Cir. 1998) (remand for failure to explain deviation from past precedent and policy); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 at 897 (D.C. Cir. 1999) ("We therefore hold that the Commission's 180 degree turn away from Kentucky Utilities was arbitrary and capricious. For the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious."). While the Commission is entitled to depart from previous policies, to engage in reasoned decision making the Commission must explain the basis for any departure. *Mississippi Valley v. FERC*, 659 F.2d 488, 506-07 (5th Cir. 1981).

of the *pro forma* OATT is a failure of reasoned decision making and warrants a grant of rehearing in this proceeding and a rejection of the proposed NERC standards.<sup>14</sup>

**C. The TLR Order Acknowledges that the TLR Reliability Standard is Discriminatory and Errs in Accepting it Despite this Finding.**

Despite acknowledging the problems with the existing IDC, which the instant Reliability Standard relies upon to assign curtailments when a Reliability Coordinator directs a TLR, the Order fails to reject the proposed standard or otherwise order NERC to fix the identified problems:<sup>15</sup>

NRG identifies two significant problems with the IDC that IRO-006-4 does not address: (1) the generation and load data relied on by the IDC is static, with no requirement that it be regularly updated or accurately reflect real-time conditions; and (2) the IDC methodology does not curtail certain schedules or determine native network load obligations accurately in some cases, leading to a discriminatory assignment of reliability obligations.

In response to these comments, the TLR Order expressly finds that the issues raised by the Rehearing Parties are valid:<sup>16</sup>

The Commission believes that NRG and other commenters raise valid issues and urges the commenters to raise—and expects the ERO to consider—these matters in an appropriate proceeding.

Even after conceding that the proposed TLR process discriminates against certain market participants as detailed by the Rehearing Parties, the Commission nevertheless accepts the proposed IRO-006 Reliability Standard. However, as discussed, Section 215(d) prohibits the Commission from accepting a Reliability Standard that is not just and reasonable, or one that unduly discriminates against certain market participants.<sup>17</sup>

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<sup>14</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>15</sup> TLR Order at P 18.

<sup>16</sup> TLR Order at P 21.

<sup>17</sup> 16 U.S.C. § 810o(d) (2008).

Further, it is not reasoned decision making for the Commission to acknowledge that the proposed standard would lead “to a discriminatory assignment of reliability obligations” and a violation of the *pro forma* OATT, while still accepting it as a mandatory Reliability Standard under the just and reasonable standard.<sup>18</sup>

**D. The TLR Reliability Standard Unduly Discriminates Against Merchant Generators and Provides an Unlawful Preference for LSE Transactions.**

The Rehearing Parties also provided examples of where the current TLR process violates the prohibition against undue discrimination.<sup>19</sup> For example, when determining what curtailments to order, the IDC does not include power purchases by a host balancing authority in the NNL curtailment calculations, because NNL is calculated taking into account only those generation facilities owned by the host balancing authority. The result is that transactions involving independent power producers (“IPPs”) are curtailed in favor of transactions involving the host balancing authority. In areas such as Entergy, where the host balancing authority routinely transacts (both short and long-term) with nonaffiliated generators and designates those resources as Network Resources under its OATT, the resulting NNL calculation for the host balancing authority is severely understated. Again, the TLR Order erred in accepting a Reliability Standard that runs afoul of Section 215’s prohibition against adopting a mandatory reliability rule that results in undue discrimination or provides an undue preference.<sup>20</sup>

**E. The TLR Order Erred in Not Remanding the TLR Standards Back to NERC.**

Presented with evidence that the proposed Reliability Standard violates the Commission’s *pro forma* OATT and that the standard results in discriminatory curtailment of transmission

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<sup>18</sup> Finding that a proposed standard is unduly discriminatory and then accepting the same standard pursuant to a statute that prohibits the acceptance of unduly discriminatory standards is the very definition of arbitrary and capricious. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>19</sup> *See, e.g.*, October 10, 2008 Comments of the NRG Companies, at pp. 13 – 17.

<sup>20</sup> 16 U.S.S. § 810o(d) (2008).

service, the only lawful outcome is for the Commission to remand the standard back to NERC for further consideration. Section 215 provides the Commission the express authority to:<sup>21</sup>

[O]rder the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section.

Section 215(f) likewise gives the Commission the authority to modify a proposed Reliability Standard in a rulemaking:<sup>22</sup>

The Commission, upon its own motion or complaint, may propose a change to the rules of the ERO. A proposed rule or proposed rule change shall take effect upon a finding by the Commission, after notice and opportunity for comment, that the change is just, reasonable, not unduly discriminatory or preferential [and] is in the public interest[.]

Accordingly, the Commission has the authority to remand proposed Reliability Standard IRO-006-4 back to NERC for further consideration, but failed to exercise this authority, as it should have done when presented with a discriminatory and unlawful NERC standard.

The NERC Compliance Filing states that NERC is making “preliminary efforts” to improve the IDC, “such that it can more accurately determine the impacts of native load and network service, and promote intra-area redispatch as necessary to support reliability goals.”<sup>23</sup> NERC estimates that it will require two to five additional years before it will be able to institute even preliminary improvements to the IDC.

Two to five additional years is simply too long for the Commission to wait to address the OATT violations caused by the existing standard. NERC has already had three years to make improvements to the TLR process, and proceeded to recommend that the Commission adopt TLR procedures identical to those in place prior to the adoption of Section 215.

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<sup>21</sup> 16 U.S.C. § 824o(d)(5) (2008).

<sup>22</sup> 16 U.S.C. § 824o(f) (2008).

<sup>23</sup> September 11, 2008 NERC Compliance Filing, at p. 10.

**F. At a Minimum, the Commission Should Impose a Compliance Obligation on NERC and Clarify that Entities are not Precluded from Seeking Individualized Relief**

At a minimum, the Commission should clarify that NERC must address the Rehearing Parties' concerns within a set time period and either fix the IDC or eliminate reliance on the IDC to make curtailment decisions. At Paragraph 1, the Commission directs "NERC to develop modifications to Reliability Standard IRO-006-4 to address specific Commission concerns." However, in the portions of the Order discussing the Rehearing Parties' concerns, the Commission does not expressly mandate NERC to develop a non-discriminatory TLR procedure for filing. The Commission should clarify its intent that the Rehearing Parties' concerns are among those that the Order expressly directs NERC to address.

Further, if the Commission determines that it will not require NERC to address these problems systematically and on an expedited basis, the Commission should make clear that customers are not precluded from seeking relief from the discriminatory effect of TLR procedures through case-by-case complaint proceedings.

**III. CONCLUSION**

WHEREFORE, the Rehearing Parties respectfully request that the Commission grant rehearing of the TLR Order, reject proposed Reliability Standard IRO-006-4 as discriminatory, and direct NERC to immediately develop a TLR process that complies with the curtailment priorities the Commission established in its *pro forma* open access transmission tariff.

Respectfully submitted,

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## Certificate Of Service

I hereby certify that I have served a copy of the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Princeton, NJ this 20<sup>th</sup> day of April, 2009.

/s/ Yvonne Harnischfeger  
Yvonne Harnischfeger