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March 27, 2001

Mr. Donald S. Clark  
Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: VO10003-- Comments Regarding Retail Electricity Competition

## **COMMENTS OF MINNESOTA POWER**

### **I. Introduction and Summary of Comments**

Minnesota Power is pleased to offer its comments on the Federal Trade Commission's ("FTC") notice requesting comments on retail electricity competition plans, published at 66 *Fed. Reg.* 13536 (March 6, 2001).

Minnesota Power is a low-cost electric utility that generates, transmits, distributes, and markets electricity to some 144,000 customers in Northeastern Minnesota and Northwestern Wisconsin. The company serves some of the largest industrial customers in the United States -- companies whose operations depend on a reliable supply of reasonably priced electricity. Minnesota Power is a subsidiary of ALLETE, a multi-services company with corporate headquarters in Duluth, Minnesota. Other ALLETE holdings include the second largest wholesale automobile auction network in North America; the leading provider of independent auto dealer inventory financing; the largest investor-owned water utilities in Florida and North Carolina; and significant real estate holdings in Florida.

Minnesota and Wisconsin are among those states that have not adopted retail customer choice plans, although both states have, for several years, been studying the implications of retail choice. Accordingly, these comments are directed at those wholesale market structural issues which threaten the industry's continuing ability to provide adequate supplies of reliable and reasonably priced electricity to its customers regardless of whether a state remains traditionally regulated or has already adopted a customer choice plan.

These issues are highly relevant to the implementation of successful state electricity restructuring plans. As the recent experience in California has demonstrated vividly, wholesale and retail market designs must be compatible if electricity competition is to succeed and bring benefits to consumers. State actions, or in some cases inaction, with respect to the timing and mechanics of the transition to retail competition and siting and building of new generation and transmission have significant implications for wholesale markets, traditional utility regulation and regulated electric service providers. Conflicts between wholesale and retail market designs, as seen in California, are making state officials, regulators, and the public leery of the whole notion of electricity "deregulation." Additional action at the Federal level is necessary to establish a wholesale market framework that can facilitate the success of carefully crafted state retail competition plans.

With the enactment of the Energy Policy Act of 1992, followed by Federal Energy Regulatory Commission ("FERC") Order Nos. 888, 889, and 2000, the Federally-regulated wholesale market has become increasingly competitive. Federal policy now is to rely, where possible, on the discipline of the marketplace in lieu of FERC electricity rate regulation at the wholesale level. While it is difficult to quantify accurately the savings to consumers from this increased liberalization, there is no doubt that savings have been substantial. Expanding the geographic scope of wholesale markets can be expected to yield even greater savings as a consequence of more buyers and sellers having access to one another.

Efficient and fair electricity markets require that competitors have open access to transmission facilities, the right to interconnect generation with these facilities, and operating rules and procedures that are transparent and fair to all market participants. FERC Order Nos. 888, 889, and 2000 address these fundamental issues and are an important first step in the evolution of the wholesale markets. We urge, however, that the FERC make membership in a regional transmission organization (RTO) mandatory in order to help alleviate any concern that the operation of the transmission system by transmission owners can be used to disadvantage other market participants. Expanding the size of RTOs to encompass even greater geographic areas should also be an important policy objective to ensure robust competition. The report to be produced by the FTC at the end of the current comment process should, we believe, incorporate these among its recommendations for additional Federal legislative or regulatory action.

Another key to properly functioning wholesale markets is having the infrastructure in place to support these markets. Transmission congestion increases the opportunities for the exercise of market power in generation, by effectively shutting out other generators during the times of congestion. Unless

there is adequate transmission capacity, increased congestion, a greater potential for the exercise of market power by generators, higher prices and reduced reliability will be the consequences.

The sheer number of transactions and volumes that the transmission grid is being asked to accommodate is taxing the capacity of our transmission infrastructure. At the same time, intensifying state/Federal jurisdictional disputes over transmission, fragmented authority over siting of needed facilities, and inadequate incentives for transmission investment discourage transmission owners from investing in these facilities.

Minnesota Power's experience in attempting to construct a needed transmission line between Minnesota, in the Mid-Continent Area Power Pool (MAPP) reliability region, and central Wisconsin, in the Mid-America Interconnected Network (MAIN) reliability region, is instructive. For over a decade, Minnesota Power transmission engineers worked with their counterparts in eastern Wisconsin utilities in an effort to include a 220 mile, 345 kV transmission line between Duluth, MN and Wausau, WI in a series of Wisconsin Advance Plans, which provide a blueprint for future electrical system expansions and upgrades. Although there was general recognition that the new line would enhance reliability, it was not included in the State's approved Advance Plans.

In 1998, a combination of nuclear plant outages in Wisconsin and the loss of the only high voltage transmission line between Minnesota and Wisconsin resulted in rolling blackouts in eastern Wisconsin, and voltage reductions in northeastern Minnesota that caused loss of service to a number of large industrial customers. As the concern about reliability went from a technical theory to reality, Wisconsin regulators and legislators became much more interested in solutions. As a result, and after going through another regional planning process establishing the Arrowhead to Weston line as a preferred option, Minnesota Power and Wisconsin Public Service applied for routing permits.

In September, 1999, Minnesota Power applied to the Minnesota Environmental Quality Board (MEQB) for a 12 mile route permit for the Minnesota segment of the line. In spite of the fact that the 345 kV line is essentially an upgrade of an existing line, the MEQB process took 18 months. With the MEQB permit in hand, Minnesota Power has now moved to getting local zoning and other conditional use permits. Permits from the Minnesota and Wisconsin Departments of Natural Resources and the U.S. Army Corps of Engineers may also be required, as the line will cross the St. Louis River. A decision on the construction application from the Wisconsin Public Service Commission is not expected until late summer at the earliest and, if favorable, will also need to be followed by permits from the National Park Service, the

Corps of Engineers, the Wisconsin Department of Natural Resources and local permits. In addition, groups opposing the line are committed to court appeals. Thus, an interstate transmission line, known to be needed for regional reliability since the late 1980's will, if successful, have taken at least 15 years to secure the necessary support and approvals.

## **II. Overview of Federal Actions Needed**

State customer choice plans will not be successful unless wholesale markets work fairly and efficiently. Congressional action is required to settle jurisdictional disputes, eliminate Federal barriers that stand in the way of a more competitive industry, and to establish incentives necessary to site and build needed transmission capacity.

Minnesota Power recommends the following policy changes to help ensure that the wholesale markets work efficiently and fairly and facilitate state retail competition programs, and encourages the FTC to include these recommendations in its final report:

Clarify the Federal Power Act to ensure that FERC has jurisdiction over all transmission in interstate commerce, including transmission used to support retail sales, whether bundled with a retail sale or not, in order to prevent balkanization and inefficiency.

Require all transmission owners to be members of an independent Regional Transmission Organization, in order to reduce opportunities for the abuse of market power and to expand the size of regional markets.

Require the FERC to allow innovative, non-cost-based rates in order to encourage the construction of needed new transmission capacity.

Require FERC to allow enhanced rates of return in order to encourage new transmission.

Address siting issues that delay or prevent needed new transmission by encouraging regional coordination and a Federal right of eminent domain where a state has been unable to expeditiously site facilities deemed essential through a regional transmission planning process.

## **III. Jurisdictional Disputes Threaten Efficient Wholesale and Retail Markets**

Section 201 of the Federal Power Act establishes a comprehensive regulatory scheme for the electric industry. The states are given authority over generation, intrastate transmission, local distribution, and retail power sales.

FERC is given jurisdiction in two areas: (1) wholesale sales in interstate commerce; and (2) transmission in interstate commerce.

In Order No. 888, the Commission interpreted section 201 of the Federal Power Act as giving to the states the regulation of the transmission component of “bundled” retail sales. The Commission concluded that “when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail,” which is subject to state regulation, and not interstate transmission, which is subject to FERC regulation. Order No. 888, *FERC Statutes and Regulations* ¶ 31,036 at 31,781. However, FERC did assert jurisdiction over all transmission in interstate commerce supporting retail sales once that transmission was “unbundled” or separated from the retail sale of electricity as part of a state ordered retail access program. The Commission reasoned that once transmission was unbundled, it no longer was part of the retail sale of electricity, and thus became subject to FERC’s jurisdiction over transmission in interstate commerce.

The U.S. Court of Appeals for the D.C. Circuit upheld FERC’s assertion of jurisdiction in Order No. 888 over the transmission component of unbundled retail sales.<sup>1</sup> The D.C. Circuit construed Order No. 888’s jurisdictional finding as a policy, not a legal matter. Thus, the court intimated that FERC, if it had chosen to do so, could have asserted jurisdiction over the transmission component of bundled retail sales as well.

The D.C. Circuit decision has been appealed both by those who argue that the FERC did not go far enough in asserting jurisdiction over transmission in interstate commerce supporting retail sales, and those that argue that it went too far in asserting any jurisdiction at all. The Supreme Court has granted *certiorari* to hear these appeals.

It has become increasingly clear that the dispute over who has jurisdiction over transmission supporting retail sales threatens competitive wholesale markets and has led to a balkanized transmission system. Events in California and elsewhere presage increasing tension between the states and FERC over who controls our interstate transmission highways. As a consequence, transmission owners do not know who ultimately will regulate important transmission assets, what the rate of return will be, or what rules will apply. This discourages needed investment.

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<sup>1</sup>*Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000)(*emphasis added*).

Congress should resolve this dispute by clearly granting to the FERC jurisdiction over all transmission in interstate commerce, whether the transmission is bundled with a retail sale or not.

Further, FERC should be empowered to require all transmission owners to be members of an independent Regional Transmission Organization, in order to reduce opportunities for the abuse of market power and to expand the size of regional markets. Some states may view the advent of RTOs as a loss of jurisdiction, and the problems in California have given rise to strong protectionism themes in other states. While everyone knows about the impacts of rolling blackouts, the root causes of such disruptions, and the fundamentals of the electric system itself, are not widely known or understood by the public and state leaders in many other areas of the country. The predictable reaction to the California crisis is a growing resistance to structural changes even at the wholesale level, even though those changes may be precisely what is needed to avert repetition of the California experience elsewhere.

California's problems also teach that no state is an electrical island. Individual states acting alone are unable to effectively remedy or address those transmission shortages or constraints that may affect a state's electricity supply, but which occur outside a state's boundaries. For this reason, Federal legislative and regulatory action is necessary to assure the integrity and reliability of the interstate bulk power grid, and to incentivize the infrastructure necessary to ensure truly competitive interstate electric markets. The FTC's final report should address the need for Federal action in these areas.

#### **IV. Federal Leadership is Required To Site and Build Needed Transmission Capacity**

The National Electricity Reliability Council ("NERC"), has documented the serious transmission capacity crisis facing the nation. In its Reliability Assessment 2000-2009, issued in October 2000, NERC concludes that for the near term, the transmission system is "expected to operate satisfactorily." Yet already we have examples of circumstances in which the transmission system is not operating satisfactorily, or in a manner sufficient to meet the needs of consumers for reliable power. California's recent experience provides incontrovertible evidence of the inherent dangers of failing to make investments necessary to increase our ability to transmit power.

While the problems in the West have received the bulk of recent attention, transmission constraints are not limited to California. The November 1 FERC Staff Report on U.S. Bulk Power Markets examined the various regions of the country, and concluded that transmission system constraints in other parts of the

grid reduced the ability to move power to the Midwest from other regions.<sup>2</sup> The recent study of transmission needs in the MAPP Region reveals a need for substantial transmission line upgrades and new construction within the region.<sup>3</sup> In order to relieve constraints and provide reliable service, the study found that MAPP needs to construct 584 miles of improvements to 345 kV lines, 834 miles of improvements to 230 kV lines, 488 miles of improvements to 161 kV lines and 882 miles of improvements to 115 kV lines over the period 2000 through 2009.<sup>4</sup> These figures are in addition to, and assume the successful completion of, the Duluth to Wausau 345 kV line

On the whole, according to the NERC assessment, transmission line loading relief (TLR), required when demands on the system threaten to overwhelm capacity, is increasing steadily with demand and flows in magnitudes and directions never contemplated. These new flow patterns are resulting in more facilities being identified as limits to transfers, and TLR procedures are being required in areas that have not previously been subject to overloads in order to maintain the transmission system within operating limits. Increasing use of transmission loading relief procedures signals the pervasive congestion in many areas of the interstate transmission network.<sup>5</sup>

The potential for increasing congestion with attendant reliability problems becomes clear when the level of planned investment in transmission is considered. According to NERC, only 8,445 miles of transmission facility additions (defined as 230 kV lines and above) are planned throughout North America over the next 10 years.<sup>6</sup> This represents only a 4.2 percent increase in total installed circuit miles over this period of time, during which, according to the Energy Information Administration of the Department of Energy, electricity demand will grow by 1.8 percent **per year**.<sup>7</sup> Moreover, most of these additions are being planned to address local transmission concerns, and thus will not help to alleviate the constraints facing long-distance power transfers. The NERC Reliability Assessment concludes that "unless proper incentives can be

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<sup>2</sup> See Part II of Staff Report on U.S. Bulk Power Markets at page 2-9 (November 1, 2000).

<sup>3</sup> See MAPP Regional Plan: 2000 through 2009 (December 29, 2000) at 30.

<sup>4</sup> The types of improvements needed include reconductor or thermal increase on existing lines, rebuilding or converting lines, and new construction.

<sup>5</sup> See generally NERC study at 29.

<sup>6</sup> NERC study at 31.

<sup>7</sup> Energy Information Administration, Department of Energy. "Annual Energy Outlook 2001" at 4 (December, 2000).

developed to encourage investment in new transmission facilities and siting problems can be resolved, few new transmission facilities and reinforcements will be constructed.”

It does not matter how much new generation comes on line if that power cannot be delivered to the areas in which it is needed. Without a reliable transmission system, there can be no competitive market, either wholesale or retail.

Because of Federal jurisdiction over the interstate transmission grid, individual state restructuring plans cannot deal adequately with the need for effective incentives for new transmission capacity. Action at the Federal level is required. FERC should allow innovative, non-cost based incentive rates for the building of new transmission. Additionally, siting issues should be addressed by the Congress through enactment of legislation that encourages regional transmission planning, through RTOs if possible. Further, where an investment has been deemed to be necessary through the regional planning process, a federal right of eminent domain should be available to site these facilities if affected states are unable or unwilling to expeditiously approve siting of the line. Having such a process in place could potentially cut years off the time required to construct a project such as the Arrowhead-Weston project discussed above. These recommendations also should be included in the FTC’s forthcoming report.

## **V. Supplier Labeling**

Under the consumer protection issues category, the FTC notice sought comments on whether there is a need for federal assistance to provide standardized electricity supplier labeling. Labeling requirements are being advocated even in states in which retail competition is not under discussion. Proposals have even been put forth on how interstate electricity purchases should be labeled. As a result, there is a growing multitude of approaches, which are likely to engender consumer confusion without necessarily providing verifiable information to assist customers in making reasoned choices among supplier offerings. For these reasons, establishment of Federal standards for supplier labeling is required. Such standards should be universally applicable to both regulated and unregulated electricity suppliers, and should override inconsistent state standards, in order to facilitate a common system that recognizes the interstate nature of the electricity market place, and the fact that power consumed in one state may well be generated in another.

## VI. Conclusion

Greater competition in wholesale electric markets has contributed to customer savings and will contribute even more. However, key to achieving these objectives is having adequate infrastructure in place, and rules that help ensure a transparent, and fair market. The recommendations for Federal action set forth above will facilitate this.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. McMillan", written over a horizontal line.

David J. McMillan

c: Bill Libro  
Karen Evens  
Linda Hendrickson  
Jim Roberts