

## FERC Open-Access Rule May Provide Developer Certainty



*Law360, New York (June 16, 2014, 11:06 AM ET)* -- On May 15, 2014, the Federal Energy Regulatory Commission issued a notice of proposed rulemaking[1] in which it proposed to waive the open access transmission tariff ("OATT") requirements for public utilities that own, operate or control tie-lines (or "gen-tie lines") that connect electric generating units to the transmission grid. In the notice, FERC seeks comment on whether it should scale back the obligations of public utilities to provide open access transmission services on their tie-lines, provide a safe harbor for entities that are developing future projects and potentially eliminate the requirement that a generator hold an ownership interest in the gen-tie line in order to benefit from the safe harbor. Comments are due on the proposed rule July 29, 2014.

This proposed rulemaking has the potential to provide greater certainty to developers of generator plants, to substantially reduce up-front development expenses and regulatory compliance obligations, and to require unaffiliated parties who request access to a gen-tie line to bear the burden of proof that their request can be accommodated. If adopted, this would be a welcome change to FERC's regulatory framework for open access transmission service.

### Current OATT Requirements

Gen-tie lines are the transmission lines that connect a generator facility, such as a wind farm, to the network power grid. Where these lines are owned by the generation developer, they are treated as part of the interconnection customer's interconnection facilities ("ICIF") under most standard generator interconnection agreements. Power generally flows through these lines unidirectionally from the generation facility toward the network grid, and they can be quite short (several thousand feet) or span hundreds of miles and host significant transmission capacity.

Because a gen-tie line is a transmission facility subject to FERC's open access requirements, it is subject to FERC's related requirements, including the requirement to maintain an OATT, which is intended to assure that transmission service is available to third parties in a transparent and nondiscriminatory manner. At present, therefore, an ICIF owner must stand ready to provide open access transmission

service on its lines to any third party that requests service or must seek a waiver of this requirement from FERC.[2]

Previously, FERC has granted such waivers in many cases, almost as a routine matter. However, when a gen-tie owner seeks to reserve capacity for future projects, FERC has made the determination whether those projects are sufficiently developed to warrant such a reservation. ICIF owners have been required to prove that they have specific, preexisting generator expansion plans with milestones for construction, and that they have made material progress toward meeting those milestones. Furthermore, if a third party requests service on the gen-tie line, the waiver is automatically revoked and the gen-tie owner must file an OATT and commence any required interconnection studies. Third parties may file access requests with minimal effort. There is no requirement that the requesting party have concrete plans for the development of an interconnecting project that would use the gen-tie line. And, once the owner of a gen-tie line has an OATT on file, it is then subject to ongoing related regulatory compliance obligations.

By placing the onus on ICIF owners and operators to concretely demonstrate their development plans for their own lines, the current rules burden these companies' development plans, require FERC to make judgments on the progress of projects under development and create considerable uncertainty during the development phase of generator projects. Developers who do not know whether or how many third parties may seek to access their tie-lines face greater difficulty planning their projects and arranging sufficient financing upfront. Similarly, when confronted with even a bare-bones access request, a developer may be forced to expend significant sums to file an OATT and evaluate the feasibility of providing such access. This can pose unique challenges for smaller, independent generation developers, such as renewable energy projects.

### **Proposed Rule**

The May 15, 2014 notice, which follows up on a 2012 notice of inquiry,[3] proposes to correct this situation by granting eligible existing and future ICIF owners blanket waivers of all OATT requirements without the need to first file with FERC. To be eligible for a waiver, a utility must own a generating facility and sell electric energy and must own, control or operate ICIF, in whole or in part, used for transmission for the sale of electric energy at wholesale.

Going forward, FERC would address all third-party requests to use ICIF on a case-by-case basis. The notice expressly finds that "the current policy creates too low a bar for third-party requests for service." [4] If a third party requests transmission service, the blanket waiver could be revoked, but only by order if FERC determines that it is in the public interest to do so. Thus, the requirement to file an OATT would not be triggered by a simple third-party request. The gen-tie line owner would only be required to file an OATT once FERC had issued an order requiring the interconnection and the provision of transmission service.

Moreover, the notice proposes to define a "safe harbor" period for a project's first five years of development, during which there would be a rebuttable presumption that the ICIF owner intends to use all its capacity and thus should not be required to provide additional service to third parties. Although a

requesting third party could seek transmission service during this period, it would bear the burden of showing that the developer does not have definitive plans to use its capacity. This aspect of the proposed rule is designed to reduce the risk of developing phased generation projects and will require third parties to be more specific in requesting access to ICIF. This should protect the priority rights of the developers of multistage generation projects to their required available transmission capacity.

In addition, FERC's current policies require that a generator seeking such developer priority on a gen-tie line have an ownership interest in that line. This can lead to complexities in development and financing. FERC has requested comments on whether it should waive this requirement.

The effects of the proposed rule would be felt immediately. The blanket waiver would supersede any preexisting waivers on file. Moreover, although the rule would not initially affect arrangements under existing OATTs, the notice indicates FERC's willingness to consider individual requests to withdraw OATTs on file if no third party is currently taking service under them.

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[1] Notice of Proposed Rulemaking, Docket No. RM14-11-000, 147 FERC ¶ 61,123 (May 15, 2014) (Notice).

[2] See 18 C.F.R. § 35.28.

[3] Notice of Inquiry, 139 FERC ¶ 61,051 (Apr. 19, 2012).

[4] Notice, at 27.