Notice of Inquiry on FERC Policy for Access to Interconnection Facilities

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On April 19, 2012, the Federal Energy Regulatory Commission (“FERC”) issued a Notice of Inquiry on open access and priority rights with regard to interconnection facilities, i.e. generator lead lines (the “NOI”). As explained in more detail below in the NOI, FERC seeks comments on its policies for addressing open access and priority rights for capacity on interconnection facilities and its proposed alternative approaches for handling third-party requests for service and priority rights. Because potential revisions to FERC’s current policies on open access and priority rights to interconnection facilities will affect generation developers, interconnection customers owning interconnection facilities, and transmission providers, all of these parties will want to closely monitor the docket and may wish to file comments setting forth their positions on the issues. NOIs are typically pre-cursors to Notices of Proposed Rulemakings, which are issued after the Commission reviews the NOI comments and proposes new policies or regulations, which themselves will be subject to further comment. Comments on the NOI are due June 11, 2012.¹

I. Open Access and Priority Policies on Interconnection Customer Interconnection Facilities

The NOI explains that FERC’s current policies are applied on a case-by-case basis and are geared towards preventing undue discrimination by ensuring that third-parties have access to available transfer capability not being used by the owner of interconnection facilities. In applying the current policies, FERC has treated interconnection facilities as transmission facilities for purposes of applying open access policies, but also permitted an owner of interconnection facilities to have priority over the capacity of its facilities for existing use at the time a third-party requests service. These priority rights preserve the ability of generator developers to deliver output to the point of interconnection with the transmission system.

Further, if the owner of the interconnection facilities has pre-existing generator expansion plans and can demonstrate material progress towards meeting construction milestones (the “Specific Plans and Milestones Test”), FERC may grant the owner priority rights for the capacity of the interconnection facilities for future projects or expansions. In addition, an affiliate of the owner of the interconnection facilities may also obtain priority rights to the capacity of the interconnection facilities by meeting the Specific Plans and Milestones Test and showing that the plans include a transfer of ownership of the interconnection facilities to the affiliate.

Finally, the Commission currently requires that within 60 days of receipt of an unaffiliated third-party’s request for transmission service, the owner of the interconnection facilities must file a pro forma Open Access Transmission Tariff (“OATT”) with FERC.²
II. Concerns Raised by Commenters After March 2011 Technical Conference

FERC states that in a March 2011 technical conference, entities raised concerns with the current policies summarized above. Commenters argued, for example, that the policies might be unduly burdensome and ill suited for generator lead lines (the interconnection customer interconnection facilities) and might inhibit future development and financing of interconnection facilities and related generation projects (such as renewable projects). Commenters were also described as stating that FERC should recognize the commercial, technical, legal, and other differences between transmission lines and generator lead lines. For example, some unique features of generator lead lines listed by commenters are that: 1) generator lead lines are radial lines serving solely the connecting generation (so that they are not integrated with the transmission system); 2) they do not provide benefits to the transmission system in terms of reliability or capability, and cannot be relied upon for coordinated operation of the transmission system; 3) an outage on the generator lead lines would not affect the entire transmission system; and 4) generator lead lines are viewed by developers and financing entities as an integral part of the generating facility.

The NOI also stated that commenters argued that the current policy discourages first developers from building interconnection facilities. In addition, the NOI described concerns that the Specific Plans and Milestones Test is unclear and that sections of the pro forma OATT (applying when unaffiliated third-parties submit a request for transmission service to the owner of the interconnection facilities) may not apply to generator lead lines.

In a somewhat different vein, the NOI stated that transmission providers expressed concerns with potential discrimination against transmission providers in favor of independent developers, and therefore favored reforms of the current policies that relate to the type of facility being constructed, rather than the owner.

III. FERC’s Proposals and Request for Comments

Based on these comments, the NOI begins by asking, as a threshold matter, whether the public believes that there is a need for reform of FERC’s current policies on open access and priority rights for capacity on interconnection facilities, and related issues. Then, in response to the comments received after the March 2011 technical conference, the NOI proposes two alternate approaches to the current policies on third-party requests for service and priority rights.

The first alternate approach is "continued use of an OATT framework with potential modification and clarification, including the potential introduction of a safe harbor period and a case-by-case determination on the generation developer’s priority rights." This concept includes room for clarifying the Specific Plans and Milestones Test, revising the requirements for determining when an interconnection customer should file an OATT for its interconnection facilities, and creating a more tailored OATT that reflects the differences associated with generator lead lines. The safe harbor period proposed would provide generation developers with a grace period, during which open access rules deemed relevant for the interconnection customer’s interconnection facilities would not apply, to enable the phased in development of generation projects during the grace period. This would be a significant change from FERC’s current policy, as stated, for example in Sagebrush, where FERC, consistent with its current policies, required the generator to file an OATT upon receipt of a third-party request for transmission service. As noted below, the Sagebrush owners did so after obtaining certain waivers and other clarifications regarding the scope of their OATT service.

The second alternative approach proposed is “use of a Large Generator Interconnection Agreement (LGIA)/Large Generator Interconnection Procedure (LGIP) framework in which the existing LGIA provisions that govern third-party use of a transmission provider’s interconnection facilities would be extended to the interconnection customer’s interconnection facilities (i.e., allowing parties to mutually
agree to the use of and compensation for, the facilities).”\textsuperscript{16} This proposal could, for example, expand Section 9.9.2 of the \textit{pro forma} LGIA (addressing third-party access to transmission provider interconnection facilities) to apply to interconnection customer interconnection facilities. The NOI also noted commentary that Section 9.9.2 of the LGIA allows an opportunity for interconnection customers and transmission providers to negotiate a multi-party agreement on the level of compensation owed to the interconnection customer for expenses related to the transmission provider’s interconnection facilities. The proposal considers whether FERC should develop a \textit{pro forma} multi-party agreement for entities negotiating under Section 9.9.2.\textsuperscript{17} FERC requested comments on these concepts, as well as on other potential revisions to the \textit{pro forma} LGIA and LGIP that would address how priority rights to an interconnection customer’s interconnection facilities for phased-in generation development would work within an LGIA/LGIP framework.\textsuperscript{18}

\textbf{IV. Implications}

Priority rights are important to generation developers, particularly when building projects in phases (such as in the renewable industry). If a developer builds interconnection facilities for the initial phase of a project and a third-party obtains access to excess capacity on those facilities, the developer may be forced to build new interconnection facilities for future expansions/ phases. Loss of its priority to capacity on the interconnection facilities could greatly reduce or even completely eliminate any certainty as to the feasibility and cost of building the additional interconnection facilities, as even if a third-party seeking to interconnect reimburses the developer for the original interconnection facilities, new interconnection facilities to replace the lost capacity might be significantly more expensive and unfeasible. From a financing perspective, this type of uncertainty could impact investor and lender willingness to participate in and fund projects. Increased certainty with regard to guaranteed priority rights to capacity on interconnection customer interconnection facilities could have a positive impact on financing for generation projects, including the development of additional renewable projects. As noted above, commenters have articulated the importance of priority rights to interconnection customer interconnection facilities in connection with financing. In its comments after the March 2011 technical conference, the American Wind Energy Association (“AWEA”) stated that “independent and incumbent transmission providers alike are finding it challenging to develop new capacity for a variety of reasons, but largely due to a lack of certainty around cost recovery,”\textsuperscript{19} Among AWEA’s suggested solutions, it advocated a safe harbor period guaranteeing developers priority to capacity for a set period of time, noting that developers often build projects in phases.\textsuperscript{20}

The proposed alternative policies relating to changes to OATT practices for interconnection customers owning interconnection facilities reflects the comments regarding the concern that the OATT might not fit with generator developer needs. As the comments in connection with the May 2011 technical conference indicated, most generation developers do not have the staff and/or resources to undertake costly, extensive reviews in the event that a third-party wants to interconnect using their interconnection facilities.\textsuperscript{21} This can make developers less likely to want, and less likely to have, the ability to follow the existing OATT process. Invenergy Wind Development LLC, for example, stated after the March 2011 technical conference that FERC “should limit a Generator Lead Line Owner’s obligation to following more limited procedures (an “OATT-Light”) based on a standard Facilities Use Agreement designed to take into account the limited nature of the transmission facility and the Generator Lead Line Owner’s business model.”\textsuperscript{22}

In addition, generator owners of interconnection facilities that become subject to transmission services under a filed OATT need to review potential implications under the Public Utility Holding Company Act of 2005 (“PUHCA”). The exempt wholesale generator exemption from PUHCA regulation may no longer apply and other blanket authorizations or exemptions may need to be utilized. As a result, owners of such interconnection facilities now being used for transmission services by third-parties should carefully review the ability to continue to be exempt from PUHCA.
FERC has, on a case-by-case basis, recognized that OATT provisions may not always fit with generation developer interconnection facilities. For example, in Sagebrush, FERC required the generator to file an OATT, but also waived the pro forma OATT’s provisions for network service to a single transmission line that does not have a control area or the generation resources necessary to provide network service and waived provisions regarding ancillary service because any customers would be expected to enter and obtain those services from Southern California Edison Company (“So. Cal. Edison”) or from the California Independent System Operator Market.23 The NOI cited to Sagebrush and appears to be probing whether a waiver of OATT provisions that do not fit well with generator developer interconnection facilities should be done on a more systematic basis.

Generation developers should monitor this NOI docket and may wish to submit their comments regarding the place of priority rights in their planning, their views regarding the open access policies described above, and any solutions they might suggest to issues experienced with regard to priority rights and open access in connection with interconnection customer interconnection facilities. This holds true for both developers who build interconnection facilities, as well as those who might request to interconnect with existing interconnection facilities.

Transmission providers will want to participate in, if not monitor, this proceeding to track potential changes to how FERC handles priority rights and open access. The potential revisions to the OATT, LGIA, and LGIP described in the proposed alternatives would likely impact transmission providers. So. Cal. Edison’s comments after the March 2011 technical conference illustrate transmission providers’ potential concern that any FERC action should ensure a level playing field for all transmission owners when developing policies to balance open access with certainty.24 Southern Company Services, Inc. (“Southern”) similarly expressed concern that “pro-merchant and nonincumbent transmission owner policies may undermine existing transmission owners/load serving entities’ ability to reliably and economically serve native load.”25 Southern advocated a regional, rather than generic, approach to reform. Transmission providers may want to submit comments in response to the NOI regarding how changes to priority rights and open access for interconnection facilities could impact their interests.

These potential revisions to FERC’s current policies on open access and priority rights to interconnection facilities will affect and should therefore be of interest to generation developers, interconnection customers owning interconnection facilities, and transmission providers. A full copy of the NOI is available at the following FERC link: Notice of Inquiry. Comments are due on the NOI on June 11, 2012.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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2 Id., at PP 1-2. Generation developers own interconnection facilities when they fund and construct a portion of interconnection facilities but do not transfer ownership or control to the transmission provider. These interconnection customer interconnection facilities are located between the generating facility and the point where the transmission provider’s interconnection facilities begin or the point of interconnection. Id., at P 7. See also Sagebrush, a California Partnership, 130 FERC ¶ 61,093, order on reh’g, 132 FERC ¶ 61,234 (2010) (Sagebrush).


4 NOI, at PP 8-16. See also infra n. xix and xx.

5 Id., at P 9.

6 Id., at PP 10-16.

7 Id., at P 17.

8 Id., at PP 18-21.

9 Id., at PP 22-42

10 Id., at PP 3, 22-37.

11 Id., at PP 23-24.

12 Id., at PP 25-27.

13 Id., at PP 28-34.

14 Id., at PP 35-37.

15 See e.g. Sagebrush.

16 Id., at P 3, 38-42.

17 Id., at PP 38-41.

18 Id., at P 41.


20 Id., at p. 12-15.

21 See e.g. id., at p. 9, stating “the development of a full OATT for such facilities in order to ensure open access is neither appropriate nor necessary.”

22 Post-Conference Comments of Invenergy Wind Development LLC and Invenergy Thermal Development LLC, Docket No. AD11-11-000, at p. 3 (May 5, 2011).

23 Sagebrush, at P 29.


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