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Energy Law
ALERT
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Federal Energy Regulatory Commission's Technical Conference on Priority Rights to New Participant-Funded Transmission

On Tuesday, March 15, 2011, the Federal Energy Regulatory Commission (FERC or Commission) held a technical conference on Priority Rights to New Participant-Funded Transmission. Its purpose was to allow the Commission's staff to explore issues related to priority rights to use independent or merchant transmission infrastructure, and generator lead lines.

Generation owners, particularly renewable generation owners located far from transmission grids, have increasingly chosen to construct their own interconnection lines to deliver power to the integrated transmission grid. Recently, these generation owners have sought to secure priority rights to their generator lead lines in order to ensure that third parties do not claim capacity over the line. FERC decisions, for example the *Milford Wind Corridor* decision (129 FERC ¶ 61,149 (2009)), have permitted generation owners to reserve capacity over their generator leads, but still require them to accommodate third parties on the line if requested to do so. A request for capacity on a generator lead line will cause the generation owner to become a regulated transmission provider. Among other things, FERC regulations require that the generation owner file an Open Access Transmission Tariff (OATT) with FERC, and adopt open access policies, within 60 days of a third party request for capacity.

Among the issues discussed at the Technical Conference were the nature of generator lead lines, why generator lead lines should or should not be considered unique among transmission facilities, whether the Commission should continue to apply open access policies to generator lead lines, and how a generator should justify priority rights over generator leads while abiding by FERC's open access policies.

Loeb & Loeb partner Richard Lorenzo, who previously wrote on this issue in an article published by Bloomberg Law Reports, participated as a panelist in the generator lead line discussion. The panel also consisted of several experts in the generation development field, including representatives from traditional, vertically integrated utilities, renewable generation developers, and utility counsel. The panel discussed several issues in the FERC's current generator lead policy that have led to problems.

- The Commission's policies may inadvertently favor second comers to a particular generation market, because they may simply "latch on" to a previously constructed lead line, forcing the first developer to accommodate them. This discourages first comers from constructing generator leads to the transmission grid, and in turn discourages the development of renewable power.
- The requirement that a generator lead provider must file an OATT within 60 days should be reconsidered for several reasons:
 - The process of filing an OATT and becoming a regulated transmission provider is outside of the business model of most generation developers. The triggering of the OATT requirement causes generators to spend time and resources that could be spent developing generation. These costs outweigh any potential benefits from receiving a regulated return for use of its generator lead by others.

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- Those requesting service do not need to demonstrate any commitment to bringing their project to completion in order to trigger the OATT requirement. This means that if a third party requests access to a generator lead, but never takes service over the line, the owner of the generator lead still must file an OATT and become a transmission provider.

The panel also suggested several potential solutions that FERC may consider in resolving the issues with its current generator lead policy.

- FERC should determine that generator lead lines and radial tie lines are different from standard transmission lines. They transport power in one direction, providing energy to the grid rather than the other way around, and, in the event of a line failure, they do not impact the remainder of the transmission system, but only the service of a single generator. FERC should treat generator leads as part of the generation facility, not as transmission lines.
- FERC may consider the development of a slimmed-down OATT for radial lines, rather than granting waivers of full open-access requirement on a case-by-case basis, as this may result in inconsistent regulation.
- FERC may consider modifying Section 9.9.2 of the *pro forma* OATT to treat generator-owned interconnection facilities like transmission owner-owned interconnection facilities, and eliminate the requirement that generator leads operate under a separate OATT.
- FERC could establish a system wherein a generator lead developer could solicit other generation developers for financial assistance in lead line development and construction in exchange for capacity on the line, whereas those generators who do not commit to the development of the line would not be permitted capacity (a “speak now or forever hold your peace” system).

FERC issued a notice soliciting written comments on the issues that were discussed during this technical conference. Written comments must be filed at FERC in Docket No. AD11-11-000 by April 21, 2011. Loeb & Loeb is exploring the possibility of forming a coalition of developers to participate in this proceeding. If you are interested, please contact Richard Lorenzo at rlorenzo@loeb.com or 202.618.5005.

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