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Client Alert

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FERC Proposed Policy Statement on Allocation of Capacity on New Merchant Transmission Projects

The Federal Energy Regulatory Commission (FERC) recently issued a Proposed Policy Statement that contemplates permitting developers of new merchant transmission projects or new nonincumbent, participant funded transmission projects to allocate up to 100 percent of a project's capacity through bilateral negotiations. This represents another step in FERC's gradual shift away from a policy that restricted capacity allocations to anchor shippers, and required open seasons in order for a merchant transmission developer to obtain negotiated rate authority.

Background

Over a decade ago, FERC began granting negotiated rate authority to merchant transmission developers out of recognition that they assume the full market risk of developing a transmission line (unlike traditional utilities that recover the cost of building transmission from captive and wholesale customers). Since first granting negotiated rate authority, FERC has been concerned about the potential for undue discrimination by merchant transmission developers in selecting and negotiating rates with customers. Initially, FERC required holding an open season and filing a subsequent open season report to protect against undue discrimination, and included these requirements in its ten criteria for evaluating negotiated rate authority. In *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 (2009), FERC replaced the ten criteria examination with a four-factor analysis. Under this analysis, rather than explicitly requiring an open season and open season report, the Commission evaluated the potential for undue discrimination generally, and found that holding an open season and filing an open-season report were acceptable measures that could guard against undue discrimination. At this time, FERC authorized merchant transmission developers to allocate up to 50 percent of a project's capacity through anchor customer pre-subscriptions, as long as the remaining capacity was allocated in a subsequent open season. In later orders, while continuing to require an open season and the filing of a sufficient open season report, FERC permitted merchant transmission developers to allocate up to 75 percent of a project's capacity to anchor shippers.

Proposed Policy Statement

The Proposed Policy Statement changes FERC's evaluation of undue discrimination under the *Chinook* four-factor analysis. FERC explained that, based on its experience and information provided by the industry, it now "believes that bilateral negotiations, if conducted in a transparent manner, may serve the same purpose as an open season process by ensuring against undue discrimination or preference in the provision of transmission service." As a result, in lieu of an open season, a merchant transmission developer may hold an "open solicitation" to identify potential customers. The open solicitation must include a broad notice "issued in a manner than ensures that all potential and interested customers are informed of the proposed project," contact information for the transmission developer, relevant technical specifications for the project, pertinent project dates, and any criteria the developer plans to use to select transmission customers. Following the open season, merchant transmission developers and potential customers may "negotiate individualized terms that meet their unique needs." The Proposed Policy Statement allows for "distinctions among prospective customers" in these negotiations as long as they are based on "transparent and not unduly discriminatory or preferential criteria." As an example of a permitted distinction, FERC notes that "developers might offer 'first mover' customers more favorable terms and conditions than later customers." The Proposed Policy Statement recognizes that a potential result of such negotiations is "that a single customer may be awarded up to 100 percent of capacity."

After an open solicitation, the Proposed Policy Statement requires merchant transmission developers to submit a report documenting "the processes that lead to the identification of customers and execution of relevant capacity arrangements." As FERC explains, "[o]pen access requires not only that everyone is given an opportunity to seek access, but also that entities know how their bids were evaluated and, if they were not selected in the initial allocation of transmission rights, on what basis that decision was made." Although there is no set deadline for the report, the Proposed Policy Statement states that a report should be submitted "shortly after" the completion of the open solicitation process and the resulting negotiations.

FERC proposes to apply the new capacity allocation process to nonincumbent, cost-based, participant-funded projects, but would not change its case-by-case evaluation of requests by incumbent transmission providers for cost-based participant funded transmission projects.

The Proposed Policy Statement is not intended to change the existing requirement that developers seek specific FERC approval if an affiliate is expected to participate as a customer of the proposed project.

Comments on the Proposed Policy Statement are due September 24, 2012.