

# Client Alert

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## FERC Proposes New Regulations on Priority Rights and Access to Generator Interconnection Facilities

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On May 15, 2014, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) on open access and priority rights with regard to Interconnection Customer's Interconnection Facilities (ICIF).<sup>1</sup> The proposed changes in FERC's regulations will affect generation developers, owners and operators of generator interconnection facilities, and transmission providers. This alert describes the NOPR and identifies some important implications for market participants.

### OPEN ACCESS AND PRIORITY RIGHTS ON INTERCONNECTION FACILITIES

FERC has examined on several occasions issues related to whether developers that build new transmission facilities should have priority rights to use the new capacity and, if so, could such priority rights be granted consistent with the mandate that transmission providers and owners provide nondiscriminatory open access to their facilities. FERC's long-standing policy has been to subject interconnection facilities to its open access requirements on the same basis as transmission facilities.

FERC has granted many petitions filed by developers, owners and operators of ICIF for waiver of the open access requirements. Under current practice, these waivers are revoked if a third party requests service on ICIF and the ICIF owner and/or operator must file an open access transmission tariff (OATT) with FERC for service on ICIF within 60 days of the request for service. With regard to priority rights, while FERC has developed a case-by-case process for granting developers priority rights to use the capacity of the ICIF, "the priority rights do not diminish the risk that the ICIF owner may have to file an OATT within 60 days of a request for service," and thereby lose some of the capacity of these facilities that they had planned to use in the future.<sup>2</sup>

In April 2012, FERC opened a Notice of Inquiry (NOI) seeking comments on whether its regulations, policies, and precedents appropriately address open access to interconnection facilities, and whether and how developers of those facilities should receive priority rights to the use of those facilities.

### THE NOPR

FERC has made a preliminary finding that its "current OATT requirements as applied to ICIF may impose risks and burdens on generators and create regulatory inefficiencies that are not necessary to achieve the Commission's open access goals."<sup>3</sup> The NOPR has also determined that ICIF should not be subject to exactly the same open access requirements as transmission facilities (or interconnection facilities owned by the transmission owner).

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<sup>1</sup> Notice of Proposed Rulemaking, Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities, 147 FERC ¶ 61,123 (May 15, 2014).

<sup>2</sup> NOPR ¶¶ 31-32.

<sup>3</sup> NOPR ¶¶ 23-25.

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Accordingly, the NOPR proposes to change Section 35.28 of FERC's regulations. New section 18 C.F.R. 35.28(d)(2) would grant a blanket waiver of all OATT requirements, including the requirements in 18 C.F.R. Part 37 (to establish and maintain an Open Access Same Time Information System (OASIS)) and Part 358 (to abide by the Standards of Conduct for Transmission Providers) to any public utility that is subject to such requirements solely because it owns, controls, or operates ICIF and sells electric energy from its generating facility.

The proposed regulations will also specify under what circumstances this blanket waiver could be revoked. New section 18 C.F.R. 35.28(d)(2)(i) would state that this blanket waiver is deemed revoked as of the date the public utility ceases to satisfy the qualifications for the waiver. In addition, FERC may revoke the blanket waiver if it determines that is in the public interest to do so.

Finally, FERC would codify in its regulations the process that must be followed by a third party that wants to use the capacity of any ICIF that are under the blanket waiver. Unlike current FERC policy, the ICIF owner would not have to make the facilities available under an OATT. Instead, the party seeking access would have to apply to FERC for an order under Sections 210 and 211 of the Federal Power Act (FPA) directing the ICIF owner to connect the applicant's facilities with the ICIF (Section 210) and provide the applicant with transmission services (Section 211).

In any such proceeding, the NOPR proposes FERC will: (1) consider it in the public interest to grant priority rights to the ICIF owner and/or operator to use the capacity when the owner and/or operator can demonstrate that it has "specific plans with milestones to use such capacity to interconnect its or its affiliate's future generation projects" and (2) grant the owner/operator a five-year "safe harbor" to use the ICIF. The "safe harbor" would cover the first five years after the ICIF are energized. During that time period, if there is a request by another party to access the facilities, there will be rebuttable presumptions that the ICIF owner and/or operator should have priority rights to the capacity and not be required to expand it.

## IMPLICATIONS OF THE NOPR FOR MARKET PARTICIPANTS

As proposed by FERC, the blanket waiver of its open access requirements would not be available to entities that do not own both the ICIF and the generating facility. The reason FERC proposes to limit the blanket waiver is to ensure that the ICIF owner is subject to FERC's authority under both FPA Sections 210 and 211. Section 210 grants FERC authority to order "electric utilities" to interconnect and Section 211 grants FERC authority to order "transmitting utilities" to transmit. The FPA defines an "electric utility" as selling electric energy, and defines a "transmitting utility" as owning, controlling or operating facilities "used for transmission for the sale of electric energy at wholesale."

FERC notes that an interconnection-only entity would continue to have the option to seek waiver of the OATT requirements on a case-by-case basis. FERC states that it "seeks comment on what would be the appropriate criteria and procedures for granting such entities a waiver, and whether and under what procedures the safe harbor" could be extended to such entities.<sup>4</sup> It also seeks comment on whether there are alternatives to the case-by-case process for applying the blanket waiver to entities with a broader set of ownership structures."<sup>5</sup> It will be important for project developers to present FERC with a strong case that there will be no diminution of the benefits that the case-by-case waiver procedure affords. Developers may also wish to explain some of the

<sup>4</sup> NOPR ¶ 52.

<sup>5</sup> *Id.*

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reasons that different portions of a project might be developed under separate ownership structures, that these projects confront the same risks and burdens as a project where one company holds all of the project assets, and present options for FERC to consider applying the blanket waiver to interconnection-only entities (for example, to the extent they are affiliated or under common control with the generating facility.)

FERC's proposal to use FPA Sections 210 and 211 as the vehicles to ensure that third parties are provided nondiscriminatory access to ICIF presents important legal and policy issues. FERC adopted the open access requirements partly in response to the view, in an increasingly competitive power generation industry, that the Sections 210/211 process for obtaining transmission access was unduly burdensome, cumbersome, and weighted in favor of the incumbent transmission owner. It is also potentially time consuming because applications under Sections 210 and 211 must also meet the requirements of FPA Section 212 which requires that FERC, before issuing a final order under either Section 210 or 211, issue a proposed order setting a reasonable time for the parties to agree to terms and conditions for carrying out the order including cost allocation.

FERC would deem the blanket waiver to be revoked as of the date the public utility ceases to satisfy the qualifications for the waiver. FERC gives as an example a change in the corporate structure such that the ICIF owner is no longer the entity that sells electric energy from the generating facility. Project developers and their lenders and investors need to assess this risk carefully when designing and structuring transactions.

Comments on the NOPR are due 60 days after the NOPR is published in the Federal Register.

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