



FERC Proposes Blanket Waiver of Tariff Requirements for Generators with Interconnection Facilities Potentially Subject to Open Access Transmission Requirements

BY [BILL DEGRANDIS](#) & [STEPHEN SNYDER](#)

The Federal Energy Regulatory Commission ("FERC" or the "Commission"), through a recent Notice of Proposed Rulemaking ("NOPR"),¹ is proposing to ease regulatory uncertainty and burdens for electric generators delivering power to the transmission grid over interconnection facilities that they own. FERC is seeking public comment on a proposal to automatically waive certain regulatory requirements for owners of generation assets who may qualify as public utilities solely due to their ownership of Interconnection Customer's Interconnection Facilities ("ICIF", also commonly referred to as generator tie lines). The NOPR establishes a 60 day comment period following publication in the Federal Register, leading to a comment date of **Thursday, July 31, 2014**. Generators, developers, as well as FERC jurisdictional utilities and transmission providers will want to take a close look at the proposed rules and their implications and consider providing comments on the likely risks and benefits of such a new approach.

Current Regulatory Environment

In the NOPR, the Commission argues that current compliance requirements for such entities, specifically, FERC's Open Access Transmission Tariff ("OATT") requirements (18 C.F.R. § 35.28 (2013)), Open Access Same-Time Information System ("OASIS") requirements (18 C.F.R. § 37 (2013)), and the Standards of Conduct ("SOC") requirements (18 C.F.R. § 358 (2013)) impose risks and uncertainty on the owners of the ICIFs but "[are] not necessary to prevent unjust or unreasonable rates or unduly discriminatory behavior..."² given that "it is unlikely that any third party would request OATT service on most ICIF."³ Therefore, the Commission proposes to replace the current ad hoc system of one-off waivers of the requirement that such owners file an OATT with a blanket waiver under which an ICIF owner would not have to seek an individualized waiver or file an OATT, and potential third party users of the ICIF would have to file with the Commission seeking transmission access pursuant to Section 210 and 211 of the Federal Power Act. The NOPR would also establish a safe harbor period of five years, during which time there would be a rebuttable presumption that the ICIF owner was going to use any excess capacity on the ICIF and that the ICIF owner should not be required to expand the ICIF.

Such proposals likely will be welcomed by generators, especially those not affiliated with an otherwise FERC-regulated public utility that is already subject to the Commission's OATT and OASIS requirements. The ability to use excess ICIF capacity is especially important to generators, who have paid for and often built the ICIF and thus would reasonably expect to be able to use any excess capacity in later years.

Questions Posed in the NOPR

In the NOPR, the Commission seeks comment on this proposal, specifically soliciting comments on:

- Under what circumstances and through what procedures the blanket waiver should be revoked for a particular ICIF owner that no longer qualifies;
- Whether it is appropriate to limit the waiver solely to those ICIF owners that both own the ICIF and make the power sales from the interconnected generator;
- Whether the safe harbor period is appropriate, including whether ICIF owners seeking to take advantage of the safe harbor period should be required to make an informational filing with the Commission noting the energization date of the ICIF, providing sufficient detail to identify the ICIF and identifying the ICIF owner; and
- Whether it is appropriate to include affiliates of public utility transmission providers in the class of ICIF owners eligible for the blanket waiver.

The reforms described in the NOPR are most directly relevant to interconnection customers with interconnection facilities potentially subject to third party transmission service requests. However, stakeholders other than generation owners should consider the impact these reforms could have on their interests. Particularly, the NOPR appears focused on the interaction between an ICIF owner and another generation owner that may wish to use to ICIF to interconnect generation. The NOPR does not apparently contemplate circumstances for potential third party use of ICIF for interconnection of load. If the NOPR has not sufficiently addressed special concerns of load interconnecting to generator tie lines, commenters will likely seek to address this in comments.

Background

ICIF owners that own transmission facilities in interstate commerce, even if those facilities consist solely of the facilities necessary to interconnect their generating facility to the transmission system, are public utilities for the purposes of the Federal Power Act. As such, these entities are required to file an OATT, which as FERC notes, is often an onerous requirement for entities that do not see themselves in the business of providing transmission service. Further, given the nature of these transmission facilities, which tend to be radial lines simply connecting a generator or series of generators to the transmissions system, there is rarely even a desire on the part of third parties, let alone a compelling need, for third party interconnection in order to ensure just and reasonable and not unduly discriminatory access to the transmission system. Although today an ICIF owner can request, and will typically obtain, waivers of requirements related to filing an OATT, the entity automatically loses its waiver if a third party requests interconnection service. ICIF owners also face regulatory hurdles when they file at FERC to secure priority interest of the interconnection facility's capacity.

NOPR Reforms

To reduce risks and burdens to owners under current rules, the Commission proposes to substitute the current “case-by-case approach” for issuing exceptions with an approach that would grant blanket waivers of all OATT, OASIS and SOC requirements for the relevant ICIF owners. Unlike the current framework, an ICIF owner’s eligibility for the blanket waiver would not be annulled by a third party’s service request. A third party seeking transmission service would be required to file an application with FERC under Section 210 and 211 of the Federal Power Act to attempt to require interconnection and transmission service. As FERC is proposing to use the Section 210 and Section 211 procedures for seeking service, FERC has proposed to limit the applicability of the blanket waivers to entities that are selling electric power from the generators (and thus meet the definition of an “electric utility” subject to Section 210) and that also own the ICIF (and thus are “transmitting utilities” for the purposes of Section 211). FERC seeks comment on whether it is appropriate to exclude from the blanket waiver ICIF owners that are subject to Section 211 as transmitting utilities but that do not sell the power from the generation units at wholesale, and thus are not electric utilities for the purposes of Section 210.

The proposed rule would also allow owners to maintain priority rights until a third-party initiates a concurrent proceeding under section 210 and 211, since FERC has reached the conclusion that “with respect to ICIF eligible for the blanket waiver...it is generally in the public interest under sections 210 and 211 of the Federal Power ACT (FPA) to allow an ICIF owner to retain priority rights to the use of excess capacity.”⁴ Under such a proceeding, the Commission will continue to require that ICIF owners demonstrate “specific plans and milestones” that justify their claim to priority rights. However, under the NOPR, not only will the ICIF owner no longer be required to offer service under an OATT, but also they will have “procedural rights set forth in sections 210, 211 and 212” when faced with a request for transmission service, as opposed to the current situation where any request for service, even if unlikely to move forward, would automatically cancel any waiver held by the ICIF owner.⁵

The NOPR also provides for a safe harbor period whereby ICIF owners will enjoy a rebuttable presumption that for the first five years after the ICIF is energized “(1) the owner and/or operator of such facilities has definitive plans to use the capacity thereon, and it is thus in the public interest to grant priority rights to the owner and/or operator of such facilities to use capacity thereon; and (2) the owner and/or operator of such facilities should not be required to expand its facilities.”⁶ Therefore, instead of a third party request automatically eliminating an ICIF waiver and requiring the filing of an OATT, a third party would have to proceed via Section 210 and 211 of the Federal Power Act, and during the first five years following energization, would have the burden of proving that the ICIF owner did not have definitive plans to use any excess capacity. In order to enjoy the safe harbor protections, FERC proposes to require that the ICIF owner submit an informational filing identifying the ICIF owner, reasonably describing the ICIF and setting forth the energization date from which the safe harbor period will run. FERC seeks comments on the appropriateness of this informational filing.

Finally, the Commission seeks comment on whether the blanket waiver should extend to ICIF owners that are affiliated with public utility transmission providers in the same region.⁷ The Commission expresses concern that a vertically integrated public utility transmission provider, itself clearly subject to OATT requirements, could structure interconnections and ownership of ICIF in order to limit third party interconnection in a manner that frustrates open access to certain facilities and that is therefore unjust and unreasonable.

In sum, a wide variety of industry participants, including generators, developers, load serving entities and transmission providers will want to closely review the NOPR and consider submitting comments on issues of concern or interest.

✧ ✧ ✧

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

William D. DeGrandis
1.202.551.1720

billdegrandis@paulhastings.com

Candice Castaneda
1.202.551.1968

candicecastaneda@paulhastings.com

Stephen J. Snyder
1.202.551.1742

stephensnyder@paulhastings.com

¹ NOPR at ¶ 1.

² NOPR at ¶ 1.

³ *Id.* at ¶ 32.

⁴ *Id.* at ¶ 47.

⁵ *Id.* at ¶ 48.

⁶ *Id.* at ¶ 54.

⁷ *See id.* at ¶ 59.

Paul Hastings LLP

StayCurrent is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2014 Paul Hastings LLP.