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# EPAAct 2005: Implications for Open Access

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# Overview

- Open Access - Why Change the Tariff?
- Congress Weighs In – EPAct 2005
- FERC's Notice of Inquiry on the OATT

# Why Change the Tariff?

- Inherent differences between network and point-to-point transmission service. Network Service provides more flexibility than point-to-point.
- FERC recognized this in Order No. 888 as necessary in order to accommodate different types of customers with different needs.

# Why Change the Tariff?

- FERC now sees the difference between the two types of service as potentially interfering with market development.
- FERC wants to move more toward a single type of transmission service, which in turn moves the industry closer to Day 2 Markets.

# Why Change the Tariff?

- The fundamental problem FERC has with the tariff is the first come, first served concept.
- FERC wants to take IPPs off the margin. To do this it must eliminate the first come, first served principle that underlies the tariff.

# Why Change the Tariff?

- Rollover rights were an initial effort to take IPPs off the margin by requiring the transmission provider to build in order to maintain existing rights.
- For FERC, LMP is the ultimate solution. It eliminates first come, first served issue.
- Even with LMP, there is still a problem: who pays to upgrade the system?

# Why Change the Tariff?

- Energy markets are at a crossroads. RTOs and energy markets have developed in the Northeast and Midwest. RTOs are stalled in the South and West.
- Prior to EPAct 2005, FERC was poised to make changes to the *pro forma* tariff in order to foster more competitive markets in regions of the country that do not currently have RTOs.

# EPAct 2005: Congress Weighs In

- Pat Wood expressed frustration regarding what he perceived as mixed signals from Congress. He was not doing enough and he was doing too much.
- Chairman Kelliher saw a different message: don't push the limits of FERC jurisdiction; rather FERC should enforce the laws that are on the books in its effort to promote open access.
- Chairman Kelliher most likely sees EPAct 2005 as a vindication of his view of the matter.

# EPAAct 2005: Electricity Title

- Transmission Investment (FPA, § 219)
  - Within one year, FERC must issue rules to provide transmission rate incentives to promote capital investment in transmission.
  - FERC may approve participant funding plans for network upgrades and generator interconnection facilities.
- Kelliher believes investment in transmission will promote open access. In his view, transmission constraints are the equivalent of import quotas.
- Congestion also makes it more difficult to detect undue discrimination.

# EPAAct 2005: Electricity Title

- Electric Transmission Siting (FPA, § 216)
  - DOE must study transmission congestion and may designate “national interest electric transmission corridors.”
  - FERC has jurisdiction to issue permits for construction or modification of facilities in DOE-designated corridors if certain conditions are met.
  - Some say this provision will never be used.
  - Threat of federal government action may be enough to motivate states to act regionally.

# EPAAct 2005: Electricity Title

- Open Access – Unregulated Transmission Providers (FPA, § 211A)
  - FERC can require “unregulated transmitting utilities” to provide transmission service at rates, terms and conditions comparable to those it charges itself.
  - Codification of current policy or something more?
  - FERC has sought comment in OATT NOI.
  - Kelliher has said it might be helpful to have one set of rules and that the statute appears to give FERC more authority over terms and conditions.

# EPAAct 2005: Electricity Title

- Native Load Service Obligations (FPA, § 217)
  - Utilities with load-serving obligations given right to use generating resources and transmission rights to meet service obligations to native load customers. FERC required to use powers to facilitate service to native load.
- Kelliher has said that FERC is not seeking to eliminate the native load preference from the OATT. The NOI seeks comments on whether native load preference in the statute is the same as Order No. 888 native load preference.
- Kelliher has expressed concern that some entities might set-aside capacity for native load and then use that capacity for off-system sales.

# EPAAct 2005: Electricity Title

- **Market Transparency (FPA, § 220)**
  - FERC directed to facilitate price transparency in power and transmission markets.
  - FERC authorized to establish electronic information systems for power and transmission products.
- Chairman Kelliher has stated that there might be a need for greater transparency on transmission service denials.

# EPAAct 2005: Electricity Title

- Market Manipulation
  - New FPA § 222 creates broad anti-fraud provision fashioned on Securities Act of 1934 § 10(b)
    - Bans use or employment of “any manipulative or deceptive device or contrivance” in contravention of FERC rules “in connection with purchase or sale of electric energy or transmission services” subject to FERC’s jurisdiction.
  - FERC may consider violations of OATT to be market manipulation (*e.g.*, setting aside capacity for native load and then using for third party sales).
  - Strengthens OMOI; furthers FERC efforts to become more of a proactive enforcement agency like the SEC, CFTC.

# EPAct 2005: Electricity Title

- **Enforcement: Amendments to FPA Sections**
  - § 206(b): Eliminates 60-day delay in establishment of refund effective date to set refund date at date complaint is filed.
  - §§ 221 and 314: Penalties for false reporting. Courts authorized to sanction false reporting by banning offenders from engaging in power marketing or transmission businesses.
  - § 316: Criminal penalties for FPA violations increased to up to \$1 million and 5 years in jail. Penalties for rule, regulation, restriction, or condition violations increased to \$25,000 per day.
  - § 316A: Civil penalties for FPA Part II violations increased to up to \$1 million per day.

# FERC's OATT NOI


- Number of questions posed to the industry on a wide variety of topics. Suggested reforms might include:
  - penalty provisions for transmission providers;
  - new transmission products;
  - codification of the rollover rights policy;
  - joint transmission planning and ownership;
  - expansion of the obligation to build; and
  - use of independent 3<sup>rd</sup> party for audits.

# Conclusion

- The industry is at a crossroads with RTOs in some regions and not in others.
- Chairman Kelliher recognized the political reality that an expansion of SMD in those regions without RTOs was not likely in the near term.
- Thus, he is trying to promote open access within the current framework, *i.e.*, enforce the laws that are on the books.
- Congress has provided him with significant new enforcement tools but the message on open access is mixed.

# Conclusion

- But does tariff reform get FERC where it wants to be on open access?
- Some would say no; SMD is the only way to truly implement open access.
- Whether tariff reform is enough might depend on how far FERC is willing to go.
- If tariff reform included an “open season” on transmission capacity, the problem of IPPs on the margin might be eliminated.
- Difficult to square with the native load obligation provision of EPAct.



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