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FERC Refines Priority Rights to Participant-Funded Transmission

Developers are provided more freedom in capacity allocation negotiations, but greater transparency of the process is required.

On January 17, the Federal Energy Regulatory Commission (FERC) issued a Policy Statement providing guidance on the allocation of capacity for (a) new merchant transmission projects and (b) nonincumbent, cost-based, participant-funded transmission projects.¹ Specifically, FERC will now permit the following:

- **Developers to select a subset of customers** (that are based on not unduly discriminatory or preferential criteria) and negotiate directly with those customers to reach agreement on rates, terms, and conditions
- **Allocation of up to 100% of transmission capacity** through bilateral negotiations, provided the following two conditions are met:
 - 1) Developers broadly solicit interest in the project from potential customers.
 - 2) Developers demonstrate compliance with the solicitation, selection, and negotiation process criteria.
- **Capacity allocation to affiliates** when done in a transparent manner with adherence to certain protections, including open solicitation

Four-Factor Analysis for Merchant Transmission

In *Chinook Power Transmission, LLC*, FERC adopted a four-factor analysis for evaluating merchant transmission negotiated rate authority.² The following four factors remain current:

- 1) The justness and reasonableness of rates
- 2) The potential for undue discrimination
- 3) The potential for undue preference, including affiliate preference
- 4) Regional reliability and operational efficiency requirements

FERC stated in the Policy Statement that it will deem the second (undue discrimination) and third (undue preference) factors as satisfied if the merchant developer follows the guidelines in the Policy Statement. The other two *Chinook* factors remain elements of FERC's analysis of merchant applications for negotiated rate authority.

Transparency of Capacity Allocation

FERC now will permit merchant transmission developers to engage in an open solicitation of interest from potential transmission customers in lieu of the previous requirement of a formal open season. Such open solicitation should include a broad notice that ensures all potential and interested customers are informed of the

1. Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects: Priority Rights to New Participant-Funded Transmission, 142 FERC ¶ 61,038 (2013), available at <http://www.ferc.gov/whats-new/comm-meet/2013/011713/E-2.pdf> [hereinafter Policy Statement].

2. 126 FERC ¶ 61,134, at P 37 (2009).

proposed project (e.g., published in trade magazines or regional energy publications).

FERC will continue to require merchant transmission developers to disclose the results of their capacity allocation process, but that disclosure will now be noticed and acted upon under section 205 of the Federal Power Act. The merchant transmission developer should demonstrate the fairness of its process by providing certain information, such as the criteria used to select customers, any price terms, any risk-sharing terms, and any conditions that served as the basis for identifying the transmission customers selected. Discretion as to when to seek FERC approval for its capacity allocation process remains with the developer.

Affiliate Participation and Ownership Transfer

With respect to potential affiliate participation in the capacity allocation process, FERC will continue to expect an affirmative showing that the affiliate was not afforded an undue preference. That is, the developer will bear a “high burden” to demonstrate that the assignment of capacity to its affiliate and the corresponding treatment of nonaffiliated potential customers is just, reasonable, and not unduly preferential or discriminatory.

In a separate order dated January 17, FERC concluded that it will no longer require transfer of ownership of generator interconnection facilities to a transmission owner’s generation-developing affiliate as a condition for granting priority rights to that affiliate.³

New Merchant vs. New Nonincumbent Project

FERC clarified that it will review the transmission rates, terms, and conditions, including any agreed upon return on equity, “more closely” for a nonincumbent, cost-based, participant-funded transmission project.

FERC noted that it was not changing its case-by-case evaluation of requests for cost-based, participant-funded transmission projects by incumbent transmission providers. The Policy Statement thus does not affect incumbent transmission development for the purpose of serving native load. FERC defined “incumbents” as having a “clearly defined set of existing obligations under their OATTs [Open Access Transmission Tariffs] with regard to new transmission development” and “nonincumbent transmission developers” as not yet owning or operating transmission facilities in the region in which they propose to develop transmission (i.e., not yet subject to an OATT in that region).⁴

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3. *NextEra Energy Resources LLC*, Order Granting Petition for Declaratory Order, 142 FERC ¶ 61,043 (2013), available at <https://www.ferc.gov/whats-new/comm-meet/2013/011713/E-3.pdf>.

4. Policy Statement at P 41.

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