UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities	Docket No. RM14-11-000

REQUEST FOR REHEARING, OR IN THE ALTERNATIVE CLARIFICATION, OF THE AMERICAN PUBLIC POWER ASSOCIATION AND TRANSMISSION ACCESS POLICY STUDY GROUP

Pursuant to Federal Power Act Section 313, 16 U.S.C. § 825*l*, and 18 C.F.R. § 385.713, the American Public Power Association ("APPA") and the Transmission Access Policy Study Group ("TAPS") seek rehearing, or in the alternative clarification, of Order No. 807, the Commission's March 19, 2015 Final Rule on Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities ("ICIF Rule").[1] As a threshold matter, APPA and TAPS seek rehearing of the ICIF Rule, which needlessly erodes the open access principles established by Order 888.[2] If, on rehearing, the Commission retains the ICIF Rule in substantially its current form, we seek clarification, or in the alternative rehearing, that the Rule's changes to open access,

[1] Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities, Order No. 807, 80 Fed. Reg. 17,654 (Apr. 1, 2015), 150 FERC ¶ 61,211 (2015) (to be published as FERC Stats. & Regs. ¶ 31,367).

[2] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("Order 888").

including the five-year safe harbor period established by Section 35.28(d)(2)(ii), 18 C.F.R. § 35.28(d)(2)(ii), will be equally applicable to non-jurisdictional utilities with a reciprocity obligation, as well as public utilities.

STATEMENT OF ISSUES

1. Did the Commission err by issuing a Final Rule that failed to modify the Notice of Proposed Rulemaking ("NOPR") proposal in order to retain and be more consistent with open access principles? Order 888; *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006).

2. Did the Commission err by failing to provide that the five-year safe harbor created by the ICIF Rule for public utilities also will be applicable to non-jurisdictional utilities that own only ICIF and have a reciprocity obligation? Order 888; *Cent. Minn. Mun. Power Agency,* 79 FERC ¶ 61,260 (1997).

SPECIFICATION OF ERRORS

1. The Commission erred by issuing a Final Rule that failed to modify the NOPR proposal in order to retain and be more consistent with open access principles.
2. The Commission erred by failing to provide that the five-year safe harbor created by the ICIF Rule for public utilities also will be applicable to non-jurisdictional utilities that own only ICIF and have a reciprocity obligation.

ARGUMENT

I. THE ICIF RULE IMPROPERLY ERODES OPEN ACCESS AND SHOULD BE MODIFIED TO PRESERVE OPEN ACCESS PRINCIPLES.

Open access to transmission is the foundation of competitive generation markets and a prerequisite to the Commission's reliance on market-based rates to ensure just and reasonable wholesale sales. The ICIF Rule fundamentally erodes open access by:

(a) granting a blanket waiver relieving public utilities that own, control, or operate only ICIF ("ICIF-owners") from Open Access Transmission Tariff ("OATT"), Open Access Same-Time Information System ("OASIS"), and Standards of Conduct obligations;

(b) requiring that third parties seeking service over ICIF use Sections 210, 211, and 212 of the Federal Power Act ("FPA") to pursue any requests for such service; and

(c) creating a five-year safe harbor, starting on the commercial operation date of the ICIF, during which there is a rebuttal presumption that the ICIF-owner has definitive plans to use the capacity, and thus, has priority rights over the ICIF.

The ICIF Rule grants ICIF-owners vertical market power over access to their facilities and makes it effectively impossible for subsequent competitive generation developers to interconnect with the ICIF-owners' facilities for long periods of time, if ever. In so doing, it violates the Commission's statutory obligation to eliminate undue discrimination in transmission service, and is inconsistent with the Commission's prior rulings establishing open access as the lynchpin of its market-based approach to regulating wholesale electric rates.[3]

The ICIF Rule's grant of effectively exclusive transmission franchises to ICIF-owners also promotes inefficient use and development of a dynamic grid that is being expanded to accommodate increasing reliance on renewable resources. The specific examples of ICIF cited by the Rule show that such facilities can operate at high voltage and extend hundreds of miles. ICIF Rule P 11 & n.23. These are precisely the types of lines that will be needed to integrate new, location-constrained renewable resources. By modifying open access requirements to allow ICIF-owners to monopolize the use of such facilities, the Rule will encourage piecemeal development and operate at cross-purposes with Order 1000's objectives of efficient and cost-effective expansion.[4]

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[3] *See* Order 888, at 31,683 ("Thus, we conclude that there is more than sufficient reason to believe that transmission monopolists currently engage in unduly discriminatory practices, and that they will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so. In light of the competitive changes occurring in today's electric industry, we believe that the only effective remedy is nondiscriminatory open access transmission, including functional unbundling and OASIS requirements, and that it is within our statutory authority to order that remedy.").

[4] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842, 49,845 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323, P 4 (2011), *reh'g denied*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012), *on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64,890 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *review denied*

The Commission has long recognized that requiring generation competitors to build their own transmission is not the way to support competitive markets or just and reasonable wholesale rates.[5] By erroneously moving away from open access, the ICIF Rule does exactly that.

The Commission's justifications for the changes made by the ICIF Rule are illogical and inconsistent with both its own precedent[6] and general principles of reasoned rulemaking.[7] The Rule preamble, for example, acknowledges that very few ICIF-owners have ever been required to file OATTs under prior Commission policy, but notwithstanding that fact, concludes the "additional risks and potential regulatory burdens" are nevertheless substantial because all ICIF-owners face the possibility that a third-party might request open access service. ICIF Rule P 38. Meanwhile, the Rule treats that same possibility differently to discount the burden of the Rule on potential transmission customers, finding that because there have been so few OATT filings by ICIF-owners, the requirement that a third-party pursue service under FPA Sections 210 and 211 "will not overly burden potential customers." *Id.* P 113. The Commission cannot have it both ways—ignoring the fact that service requests to ICIF-owners are

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sub nom. S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014) (per curiam), *reh'g en banc denied*, No. 12-1232 (D.C. Cir. Oct. 17, 2014) ("Order 1000").

[5] *E.g.,* Order 888, at 31,635 ("[t]he continuing competitive changes in the industry and the prospect of these benefits to customers make it imperative that . . . all wholesale buyers and sellers of electric energy can obtain non-discriminatory transmission access"); *id.* at 31,652 ("[e]lectricity consumers are demanding access to lower cost . . . generation resources. Therefore, it is important that the non-traditional generators of cheaper power be able to gain access to the transmission grid on a non-discriminatory open access basis.").

[6] *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 326 (D.C. Cir. 2006) ("Reasoned decisionmaking necessarily requires consideration of relevant precedent.") (citing *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001)).

[7] *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 478 (7th Cir. 2009) ("'we require only that the agency have made a reasoned decision based upon substantial evidence in the record.' [] But the Commission failed to do that.") (citing *Town of Norwood v. FERC,* 962 F.2d 20, 22 (D.C.Cir. 1992)).

infrequent in order to inflate the purported regulatory burden on ICIF-owners, while relying on that same infrequency to discount the burden on potential customers.

The Commission also erroneously turns its Order 888 finding that FPA Section 211 proceedings are inadequate to prevent undue discrimination[8] on its head. Instead, the ICIF Rule (P 38) asserts that costs to potential third-party customers under FPA Sections 210 and 211 might be low (because the ICIF-owner might voluntarily agree to provide service, obviating the need for a full proceeding under those sections), and that the costs of requesting service under an OATT might be high (due to contentious litigation). To the extent the Commission seeks to justify the changes made by the ICIF Rule based on this cherry-picking—i.e., comparing a contested, procedurally expensive OATT transmission service request to an uncontested transmission service request under FPA Sections 210-211—that is not reasoned decisionmaking.

It is likewise arbitrary and capricious for the Order to find that an OATT is not necessary to prevent unjust or unreasonable rates or unduly discriminatory behavior with respect to ICIF, because, unlike the facilities at issue in Order 888, ICIF are not part of the integrated transmission network. ICIF Rule P 114; *see also id.* PP 34-36. While there may well be few requests for service over ICIF if they are not integrated and do not provide useful transmission between generation and load centers, that does not alter the ability and incentive of an ICIF-owner to engage in unduly discriminatory behavior with respect to the requests that it does receive.[9] Some ICIF *do* provide crucial links between

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[8] Order 888, at 31,646.

[9] Order 888, at 31,635. *See also* Order 888, Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662, 17,676 (proposed Mar. 29, 1995), FERC Stats. & Regs. ¶ 32,514, at 33,071 ("Unless all public utilities are required to provide non-discriminatory open access transmission, the ability to achieve full wholesale power competition, and resulting consumer benefits, will be jeopardized. If utilities are allowed to discriminate in

resource and load centers; and as Order 888 correctly found, "a portion of a grid that no one is interested in using today could become an important transmission link tomorrow." Order 888, at 31,854. At the March 2011 technical conference on Priority Rights to New Participant-Funded Transmission, generation developers admitted their interest in restricting transmission access over their ICIF in order to prevent competitors from bringing generation to the market and winning customers to which the line owner would prefer to have exclusive access.[10]

The ICIF Rule fails to justify the need for the changes it makes to prior Commission practice regarding ICIF; and the changes it makes are inconsistent with the Commission's statutory obligation to eliminate undue discrimination in transmission service, as well as its prior rulings. As described in detail in our July 29, 2014 Comments,[11] the Commission can achieve its objectives without throwing out the open

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favor of their own generation resources at the expense of providing access to others' lower cost generation resources by not providing open access on fair terms, the transmission grid will be a patchwork of open access transmission systems, systems with bilaterally negotiated arrangements, and systems with transmission ordered under section 211. Under such a patchwork of transmission systems, sellers will not have access to transmission on an equal basis, and some sellers will benefit at the expense of others. The ultimate loser in such a regime is the consumer.").

[10] *See*, *e.g.*, Transcript of March 15, 2011 Technical Conference at 167:2-15, *Priority Rights to New Participant-Funded Transmission*, Docket No. AD11-11-000, *available at* http://www.ferc.gov/EventCalendar/Files/20110328070902-AD11-11-3-15-11.pdf (Statement of Kris Zadlo, Vice President of Regulatory Affairs and Transmission for Invenergy (responding to comments regarding a potential exclusivity period for generator tie-line developers and the obligation to expand)):

> And here's the issue: That line ends some place, and that is the place where I'm doing my marketing effort. And it may take some time. PPAs are very scarce, very difficult to come by, and it takes a lot of marketing effort to get into a PPA. So if I build this gen tie-line with multiple phases, I'm out there actively marketing. And what happens when, oh, you know, my friend Kurt here from First Wind submits a request on my line. He's there competing with me, and I have no period of exclusivity to market my power. You know, a project that I've gone out there, taken on considerable risk to build and construct. I've planned multiple phases. And I don't even have an opportunity to market the power for some period of time.

[11] Comments of the American Public Power Association and the Transmission Access Policy Study Group 3, 19-25, July 29, 2014, Docket No. RM14-11-000, eLibrary No. 20140729-5104 (suggesting alternatives including granting a blanket waiver of OATT, OASIS, and Standards of Conduct requirements that is revoked upon the ICIF-owner's receipt of a qualified service request from a third party; developing a

access baby with the bathwater, and affording those seeking access to ICIF even less protection from discrimination than was available to customers before its landmark open access rulemakings. On rehearing, the Commission should therefore modify the ICIF Rule to retain and be more consistent with open access principles.

II. THE ICIF RULE'S NEW SAFE HARBOR SHOULD BE AVAILABLE TO NON-JURISDICTIONAL UTILITIES ON THE SAME BASIS AS TO PUBLIC UTILITIES.

Should the Commission fail to modify the ICIF Rule on rehearing, APPA and TAPS seek clarification, or in the alternative rehearing, that the Rule's changes to open access, including the five-year safe harbor period established by Section 35.28(d)(2)(ii) of the Commission's regulations, 18 C.F.R. § 35.28(d)(2)(ii), will be equally applicable to non-jurisdictional utilities with a reciprocity obligation, as well as public utilities. The Rule establishes both: (1) a blanket waiver from OATT, OASIS, and Standards of Conduct requirements for ICIF-owners; and (2) a five-year safe harbor, starting on the commercial operation date of the ICIF, during which there is a rebuttal presumption that the ICIF-owner has definitive plans to use the capacity, and thus, has priority rights over the ICIF. As noted in the Rule preamble (P 80), the NOPR Comments of APPA and TAPS (at 27-29) requested that both be extended to non-jurisdictional utilities with a reciprocity obligation if the Commission decided to move forward with the Rule.[12]

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standardized "Modified OATT" with appropriate modifications from the *pro forma* OATT including elimination of provisions for network transmission service and the requirement to offer ancillary services; clarifying that a third-party service application qualified to revoke waiver of an obligation to file an OATT must: (1) meet the informational requirements set forth in the *pro forma* or Modified OATT and (2) include a reasonable deposit from the entity requesting service; requiring a reasonable additional deposit, adequate to cover the ICIF-owner's costs of filing an OATT, from the third-party entity that makes the first transmission or interconnection service request to the ICIF-owner's corporate family; and otherwise narrowing the blanket waiver and safe harbor).

[12] *Accord Cent. Minn. Mun. Power Agency,* 79 FERC ¶ 61,260, at 62,127 (1997) (citing Order 888, at 31,763; *Dakota Elec. Ass'n.,* 78 FERC ¶ 61,117, at 61,452 (1997) (requests "for waiver of all or part of

In Paragraph 82 of the ICIF Rule, the Commission rules that the blanket waiver also will be available to non-public utilities with a reciprocity obligation. It is silent, however, regarding our related request that any new safe harbor period also be made available to such entities.

The Commission should clarify, or in the alternative grant rehearing, that the safe harbor presumption created by the ICIF Rule also will apply to non-jurisdictional utilities with a reciprocity obligation. As the Rule does not discuss any basis for treating the five-year safe harbor differently from the blanket waiver, it may well be that the failure to expressly mention the safe harbor in Paragraph 82 was inadvertent, or that Paragraph 82 should be interpreted to apply to both. In an abundance of caution, however, APPA and TAPS request that, should the Commission decide to not modify the ICIF Rule and to continue to include a safe harbor for ICIF-owning public utilities as part of the Rule, that it also provide the same safe harbor to non-jurisdictional utilities with a reciprocity obligation.

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the reciprocity provision . . . [are considered] using the same criteria used to determine whether to grant a waiver to a public utility.”).

CONCLUSION

As described above, the Commission should grant rehearing and modify the ICIF Rule to ensure that open access is protected. Should the Commission decide to retain its Rule in substantially its current form, it should at minimum assure that the blanket waiver and safe harbor presumption granted by the Rule are available to non-jurisdictional utilities with a reciprocity obligation, as well as public utilities.

Respectfully submitted,

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April 20, 2015