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

COMMENTS OF THE
AMERICAN PUBLIC POWER ASSOCIATION AND
TRANSMISSION ACCESS POLICY STUDY GROUP

On May 15, 2014, the Commission issued a Notice of Proposed Rulemaking that would significantly curtail the open access obligations of public utilities that own, control, or operate Interconnection Customer Interconnection Facilities ("ICIF-owners").[1] Going far beyond the options outlined in the Commission's Notice of Inquiry on this subject,[2] the NOPR proposes to: (1) relieve, by blanket waiver, public utilities that own, control, or operate only ICIF (and sell electric energy from their generating facilities) of their obligation to provide requesting third parties service pursuant to an Open Access Transmission Tariff ("OATT"); (2) relegate third parties to securing access to ICIF through Sections 210, 211, and 212 of the Federal Power Act ("FPA");[3] and (3) implement a five-year "rebuttable presumption" that affords the ICIF-owner priority rights to the use of the capacity on its line and releases it from any obligation to expand

[1] Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities, 79 Fed. Reg. 31,061 (May 30, 2014), FERC Stats. & Regs. ¶ 32,701 (2014), *corrected*, 79 Fed. Reg. 35,501 (June 23, 2014) ("NOPR").

[2] Open Access and Priority Rights on Interconnection Facilities, 77 Fed. Reg. 24,646 (Apr. 25, 2012), FERC Stats. & Regs. ¶ 35,574 (2012) ("NOI").

[3] 16 U.S.C. §§ 824i, 824j, 824k.

its facilities, after which the ICIF-owner will still retain priority if it, or any of its affiliates, has definitive plans to use the then-unused capacity.

The American Public Power Association ("APPA") and the Transmission Access Policy Study Group ("TAPS") support the Commission's desire to promote generation development, but urge the Commission not to adopt the NOPR as its final rule. Rather, the Commission should address the concerns identified in the NOPR in a manner that preserves the open access underpinnings of competitive markets and its reliance on market-based rates ("MBR") to ensure just and reasonable wholesale sales, and meets its statutory obligation to eliminate undue discrimination in transmission service.

While the NOPR (P 2) states the proposal seeks to reduce burden and risk on ICIF-owners without undermining open access and competition, it does not achieve that objective. Rather, it fundamentally erodes open access, granting ICIF-owners vertical market power over access to their facilities. Erecting significant entry barriers may encourage first-movers, but this proposal will make it effectively impossible for subsequent competitive generation developers to interconnect with the ICIF-owner's facilities for long periods of time, if ever. The Commission has long recognized that requiring competitors to build their own transmission is not the way to support competitive markets or just and reasonable wholesale rates.

The NOPR's grant of effectively exclusive transmission franchises to owners of ICIF that, as the NOPR acknowledges (P 9), can operate at high voltage and extend hundreds of miles also ensures inefficient use and development of a grid that is being expanded to accommodate increasing reliance on renewable resources. It therefore

operates at cross-purposes with Order 1000's objectives of efficient and cost-effective expansion.[4]

The Commission can achieve its objectives without throwing out the open 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. APPA and TAPS are ready and willing to work constructively to achieve such aims and suggest alternatives for consideration:

- Grant a blanket waiver of OATT, Open Access Same-Time Information System ("OASIS"), and Standards of Conduct requirements that is revoked upon the ICIF-owner's receipt of a qualified service request from a third party.

- Develop a 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.

- Clarify 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.

- Require 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.

- If the Commission—notwithstanding the alternatives supported above—allows a blanket waiver that exempts the ICIF-owner from the requirement to file an OATT following a third-party request, the final rule should restrict the duration of that exemption to a limited period during which there is a very high expectation that the ICIF-owner will be able to establish priority rights. After the expiration of that period, receipt of a qualified service request should trigger the obligation to file an OATT.

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[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) ("Order 1000"), *reh'g denied*, Order No. 1000-A, 77 Fed. Reg. 32,184 (May 31, 2012), 139 FERC ¶ 61,132 (2012) ("Order 1000-A"), *on reh'g*, Order No. 1000-B, 77 Fed. Reg. 64,890 (Oct. 24, 2012), 141 FERC ¶ 61,044 (2012), *review docketed sub nom. S.C. Pub. Serv. Auth. v. FERC*, No. 12-1232 (D.C. Cir. argued Mar. 20, 2014).

If nevertheless the Commission proceeds along the path set forth in the NOPR, APPA and TAPS urge it to: (1) restrict the scope of the proposal so that affiliates of Transmission Providers ("TPs") now operating pursuant to OATTs cannot take advantage of the blanket waiver for interconnection facilities within the TP's planning region; and (2) confirm that non-jurisdictional ICIF-owners (in reliance on the blanket waiver for public utilities) need not seek individual waivers to protect themselves from claims that they have not satisfied reciprocity.

INTEREST OF APPA AND TAPS

APPA is the national service organization representing the interest of not-for-profit, publicly-owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers and serve over 47 million people, doing business in every state except Hawaii. Public power systems own approximately 10.3% of the total installed generating capacity in the United States.

TAPS is an association of transmission-dependent utilities ("TDUs") in more than 35 states, promoting open and non-discriminatory transmission access.[5] As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members recognize the importance of both open access and a robust transmission grid to competitive generation markets, and have long advocated policies to

[5] Tom Heller, Missouri River Energy Services, chairs the TAPS Board. Jane Cirrincione, Northern California Power Agency, is TAPS' Vice Chair. John Twitty is TAPS' Executive Director.

get needed transmission built. *See* TAPS, *Effective Solutions for Getting Needed Transmission Built at Reasonable Cost* (June 2004).[6]

APPA and TAPS have actively participated in Commission proceedings leading up to this NOPR. APPA and TAPS each filed comments on the NOI.[7] In addition, TAPS participated in the March 15, 2011 technical conference that led to the NOI.[8]

Communications regarding these proceedings should be directed to:

Delia Patterson, General Counsel
AMERICAN PUBLIC POWER ASSOCIATION
1875 Connecticut Ave., NW
Suite 1200
Washington, DC 20009-5715
Tel.: (202) 467-2900
Fax: (202) 467-2918
E-mail: dpatterson@publicpower.org

John Twitty, Executive Director
TRANSMISSION ACCESS POLICY STUDY GROUP
4203 E. Woodland St.
Springfield, MO 65809
Tel.: (417) 838-8576
E-mail: 835consulting@gmail.com

Cynthia S. Bogorad
William S. Huang
Anjali G. Patel
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
Tel.: (202) 879-4000
Fax: (202) 393-2866
E-mail: cynthia.bogorad@spiegelmcd.com
william.huang@spiegelmcd.com
anjali.patel@spiegelmcd.com

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[6] *Available at* http://www.tapsgroup.org/wp-content/uploads/2013/01/effectivesolutions2.pdf.

[7] *See* Comments of the American Public Power Association, June 26, 2012, eLibrary No. 20120626-5092 ("APPA NOI Comments"); Comments of the Transmission Access Policy Study Group, June 26, 2012, eLibrary No. 20120626-5096 ("TAPS NOI Comments").

[8] Statement of Terry Wolf on Behalf of Missouri River Energy Services and the Transmission Access Policy Study Group, Mar. 15, 2011, *Priority Rights to New Participant-Funded Transmission*, Docket No. AD11-11-000, eLibrary No. 20110316-4012; Comments of the Transmission Access Policy Study Group Following Up on March 15 Technical Conference, May 5, 2011, eLibrary No. 20110505-5101. APPA and TAPS also submitted comments in response to the January 31, 2012 workshop in Docket Nos. AD11-11-000 and AD12-9-000, regarding priority rights in merchant and participant-funded transmission projects. Comments of the American Public Power Association, Mar. 29, 2012, eLibrary No. 20120329-5154; Comments of the Transmission Access Policy Study Group, Mar. 29, 2012, eLibrary No. 20120329-5168.

COMMENTS

I. THE COMMISSION SHOULD NOT ADOPT THE NOPR'S PROPOSAL, WHICH SEVERELY ERODES OPEN ACCESS REQUIREMENTS CENTRAL TO THE COMMISSION'S STATUTORY OBLIGATIONS

A. ICIF Cannot Be Exempted from Open Access Obligations

As described in the NOPR (PP 3, 11-13), ICIF-owners are currently subject to open access obligations, but are eligible to secure "limited and discrete" waiver of the OATT, OASIS, and Standards of Conduct requirements, until they receive a third-party request for service. The ICIF-owner must then file an OATT (which may be streamlined) within sixty days and provide access except to the extent it and its affiliates can demonstrate definitive plans for the unused ICIF capacity (i.e., "specific, pre-existing . . . expansion plans with milestones for construction . . . [and] material progress toward meeting those milestones"). NOPR, P 14.

The NOPR proposes to relieve ICIF-owners of their open access obligations. ICIF-owners (including affiliates of TPs that have long operated under an OATT) will need to provide access only when, and in accordance with the terms, ordered by the Commission pursuant to a final order issued at the conclusion of a proceeding under Sections 210, 211, and 212, as limited by new "safe harbor" provisions that effectively foreclose access for at least five years after energizing the ICIF. APPA and TAPS strongly urge the Commission not to adopt the NOPR's proposed departure from its open access cornerstone to competitive markets and its statutory obligations to ensure just, reasonable, and not unduly discriminatory transmission service and wholesale sales.

In acting on this NOPR, the Commission should be guided by its mandate to prevent undue discrimination and exercise of market power over transmission, and thereby support competitive generation markets.[9] As it concluded in Order 888:[10]

> [I]t is our statutory obligation under sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination.
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> To do so, we must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate against others. If we do not take this step now, the result will be benefits to some customers at the expense of others.

Order 888 expressly recognized the Commission's statutory duty to "eradicate" discriminatory transmission service,[11] and the Commission has worked hard to do so in a series of landmark orders. The most recent of these are Order 1000, in which the

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[9] *See New York v. FERC*, 535 U.S. 1, 10 (2002) (quoting Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities; Notice of Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662, 17,664 (Apr. 7, 1995), FERC Stats. & Regs. ¶ 32,514, 33,049 (1995) ("Order 888 NOPR")) ("market power through control of transmission is the single greatest impediment to competition" and "can be used, discriminatorily to block competition"). *See also id.* at 26.

[10] 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, 21,541 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, 31,635 (1996) (subsequent history omitted) ("Order 888"). *See also* Order 888 NOPR 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 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.").

[11] Order 888 at 31,682-83 (finding unduly discriminatory and anticompetitive practices by "transmission monopolists" that the Commission has a duty to "eradicate," based in part on Appendix C, *id.* at 31,919-26 (detailing abuses against TAPS members, including examples of TPs purchasing and reselling energy they refused to transmit; refusing or delaying access to transmission; or offering it only on unreasonable terms)). *See also* Order 888 NOPR at 33,070.

Commission adopted reforms it "conclude[d] . . . are necessary for more efficient and cost-effective regional transmission planning . . . [and] to meet the challenge of maintaining reliable service at a reasonable cost"[12] and Order 792, in which the Commission modified the Small Generator Interconnection Procedures/Agreement in an effort to facilitate and speed interconnection of small renewable generation.[13]

After nearly twenty years of progress toward ensuring non-discriminatory transmission service, the NOPR proposes to take a giant step backward, affording access to ICIF on a basis even more limited than was available prior to (and expressly found inadequate in) Order 888. It would invite ICIF-owners to close off access to what could well be significant highways to areas ripe for renewable resource development. As the NOPR recognizes, ICIF can be hundreds of miles long and high voltage (P 9, n.16), and are "typically" radial (*id.* P 9), so some may be networked. Yet, the NOPR would allow an ICIF-owner to hold that transmission corridor hostage, block efficient expansion, and deny access to competitors.

Order 888's conclusion that open access is needed to prevent undue discrimination and the exclusion of potential competitors by TPs that own both generation and transmission[14] applies with full force here. The ICIF-owner is likely to be the competitor of the third party seeking interconnection and transmission service over the ICIF. Thus, the ICIF-owner's incentive to use its control over ICIF to advantage its

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[12] Order 1000, P 2.

[13] Small Generator Interconnection Agreements and Procedures, Order No. 792, 78 Fed. Reg. 73,240, 73,242 (Dec. 5, 2013), *corrected*, 78 Fed. Reg. 755 (Jan. 7, 2014), *corrected*, 78 Fed. Reg. 4075 (Jan. 24, 2014), 145 FERC ¶ 61,159, P 3 (2013), *correcte*d, 146 FERC ¶ 61,019 (2014) ("Order 792").

[14] Order 888 at 31,682-84.

own generation resources is strong.[15] Generation developers at the March 2011 conference admitted their interest in restricting access to their ICIF to prevent competitors from bringing generation to the market and winning customers to which the ICIF-owner would prefer to have exclusive access:[16]

> And here's the issue: That line ends some place, and that is the place where I'm doing my marketing effort . . . . 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.

A renewable developer excluded from access to the ICIF is unlikely to reach the market at all, much less at a reasonable cost. If we want competitive wholesale markets in which generation prices are disciplined to just and reasonable levels by competitive forces, open access is essential.

Nor can the Commission assume that open access principles need not apply to ICIF because competitors can build their own.[17] The transmission network is a natural monopoly.[18] There may be some cases where an ICIF is very short and can be readily duplicated; but that will often not be true, especially with respect to the long radial lines being constructed to connect remote sources of renewable generation to markets—i.e., the lines to which third parties are most likely to request transmission access. Such lines

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[15] *See, e.g.*, Order 888 at 31,682 ("The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation.").

[16] *See, e.g.*, Transcript of March 15, 2011 Technical Conference at 167, *Technical Conference on Priority Rights to New Participant-Funded Transmission*, Docket No. AD11-11-000, http://www.ferc.gov/EventCalendar/Files/20110328070902-AD11-11-3-15-11.pdf (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).

[17] *See, e.g., id.* at 119-120, 148-149.

[18] *See, e.g.*, Order 888 at 31,649. *See also* Order 1000-A, P 86.

require extensive permitting, and regulatory siting fatigue is real.[19] It is often harder to obtain the approvals to site a second line once the first line has been permitted; and it is often easier to get approval to expand an existing line, rather than site a brand new one. Moreover, even where it is possible to obtain necessary siting approvals for duplicative lines, inefficient build-out of the grid would make it more costly than necessary to access new generation resources, burdening those resources and consumers, as well as undermining competitive wholesale markets.

Departure from the Commission's non-discriminatory access requirements cannot be excused by the fact that usage of ICIF has been requested infrequently thus far. *See* NOPR, P 32. ICIF access may well become more common in the future given the increasing dependence on renewable resources. Moreover, creating and maintaining two different and incompatible standards for access to transmission facilities is problematic in a dynamic AC grid. ICIF that look like radial lines at the fringe of the system today may be—or should be—a more central part of the network in a decade or two. If usage and expansion are blocked by access limitations stemming from the line's origin as an ICIF, it may be needlessly difficult and costly to address load-serving entity and reliability needs for these areas in the future, much less provide for an effective outlet for the area's renewable resource potential.

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[19] For example, the Commission's Merchant Transmission Policy Statement expressly recognized "concerns with respect to transmission siting fatigue and right-of-way limitations," and sought to address the potential for anticompetitive undersizing of facilities to discriminate in favor of one customer (e.g., anchor tenant) in excluding competitive generators. *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects*, 142 FERC ¶ 61,038, P 21, *clarification denied*, 142 FERC ¶ 61,213 (2013) ("Merchant Transmission Policy Statement").

B. The NOPR Would Erect an Impassable Barrier to Accessing ICIF

1. Sections 210 and 211 are insufficient to prevent discrimination in provision of transmission service and to support market-based rates

As proposed, ICIF-owners would never have an obligation to do anything but say, "No," when competitors seek access. The ICIF-owner would at no point in the life of the ICIF be required to file an OATT, or respond to requests for transmission or interconnection service pursuant to the timelines and procedures the Commission has previously found essential to prevent undue discrimination. Instead, access would be subject to the expensive and elongated statutory procedures under FPA Sections 210, 211, and 212. Even after the Commission orders access to one third party under Sections 210, 211, and 212, the ICIF-owner would not necessarily have an obligation to file an OATT (NOPR, P 53) that would allow future service requests to be processed without the expense and delay of those statutory procedures.

Under the NOPR's proposal (P 45), a customer seeking transmission service must first make a "good faith request" for service, which the ICIF-owner must respond to within 60 days (or other mutually agreed upon time) with the rates and analysis of physical or other constraints. *See* 18 C.F.R. § 2.20(a)(2); FPA § 211(a). (There is no specified response time for a request for interconnection service, as a prelude to an application to the Commission pursuant to Section 210.) To pursue service, the customer would then need to initiate a proceeding at the Commission pursuant to Sections 210, 211, and 212, which require two orders from the Commission (a proposed and final order, neither of which is subject to any deadlines). Pursuant to Section 212(c)(1), the proposed order, which is not reviewable, establishes a "reasonable time" for negotiation

of terms and conditions; if the parties do not reach agreement, or if the Commission does not approve the agreement, the Commission establishes the terms and conditions after further filings by the parties. FPA § 212(c)(2). None of this is quick or, for either party, inexpensive. As a result, even putting aside the additional limitations imposed by the NOPR (discussed below), a requesting customer will have no hope of timely ICIF access.

The Commission would need to overturn nearly two decades of consistent findings to conclude that the access afforded by Sections 210, 211, and 212 is sufficient to prevent an ICIF-owner from taking advantage of its opportunity and incentive to exclude competitors, and thereby exercise vertical market power and undermine competitive generation markets. Order 888 expressly found those statutory processes to be too cumbersome and time-consuming to provide non-discriminatory access and placed customers "at a severe disadvantage compared to the transmission owner." Order 888 at 31,646. In fact, Order 888's exercise of Section 206 authority was predicated on findings that the delays inherent in the statutory processes make them insufficient, noting that reliance on Section 211 may perpetuate, rather than eliminate, undue discrimination and anticompetitive effects (*id*. at 31,673):[20]

> First, there are inherent delays in the procedures for obtaining service under section 211. However, for competitive reasons, many transactions must be negotiated relatively quickly. Many competitive opportunities will be lost by the time the Commission can issue a final order under section 211. Case-by-case section 211 proceedings are not a substitute for tariffs of general applicability that permit timely, non-discriminatory access on request.

[20] The Order 888 NOPR (at 33,075) includes a table showing elapsed times from the date of a Section 211 filing to the issuance of a final order (averaging 9 months to completion, with 10 still-pending requests ranging from 2- to 16-months old).

> Second, discrimination is inherent in the current industry environment in which some customers and sellers are served by open access systems, and others have to rely on negotiated bilateral arrangements or the mandatory section 211 process. The end result is discrimination in the ability to obtain transmission services, as well as in the quality and prices of the services. This national patchwork of open and closed transmission systems, with disparate terms and conditions of service, cannot be cured effectively through section 211.

See also Order 888 NOPR (at 33,074) ("Third parties may seek non-discriminatory transmission under Section 211, but they will not be able to compete if the sale or purchase opportunity is gone before a final order can be obtained under Section 211.").

Order 2003[21] (P 11) likewise justified the need for standardized interconnection procedures and agreements on the delays inherent in case-by-case processes.

> [R]elatively unencumbered entry into the market is necessary for competitive markets. However, requests for interconnection frequently result in complex, time consuming technical disputes about interconnection feasibility, cost, and cost responsibility. This delay undermines the ability of generators to compete in the market and provides an unfair advantage to utilities that own both transmission and generation facilities.

Order 792 recently revised the Commisions' standardized small generator interconnection requirements to further speed and facilitate the interconnection process.

To address the inadequacy of statutory access pursuant to Sections 210 and 211, the Commission has long required MBR sellers that own transmission to offer third parties service comparable to the service the MBR seller and its affiliates provide

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[21] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *modified*, 68 Fed. Reg. 69,599 (Dec. 15, 2003), *clarified*, 69 Fed. Reg. 2,135 (Jan. 14, 2004), 106 FERC ¶ 61,009 (2004) (subsequent history omitted).

themselves,[22] as reflected in the OATT.[23] A MBR seller must demonstrate mitigation of vertical market power by showing that it and its affiliates either have filed an OATT (or received a waiver) for every transmission facility that they own, operate, or control.[24] The proposed blanket waiver does not "clarify the manner by which [ICIF] owners . . . can address concerns about vertical market power when they seek market-based rate authority" (NOPR, P 37); rather, it magnifies those concerns by discarding an essential foundation for allowing the ICIF-owner and its affiliates to enjoy market-based rates.[25]

2. The NOPR's Proposed Safe Harbor Turns the Limited Access Otherwise Available Under Sections 210 and 211 into a Nearly Complete Bar

The NOPR's safe harbor cuts back on the relief otherwise available under Sections 210, 211, and 212, and all but ensures absolute foreclosure of competitors from access to ICIF for more than five years. As proposed (NOPR, P 54), for the first five years after energizing an ICIF, there would be a "rebuttable presumption" that: (1) the eligible ICIF-owner has definitive plans to use all remaining ICIF capacity without having to demonstrate specific plans or progress toward milestones; and (2) the eligible ICIF-owner should not be required to expand its facilities. To rebut the presumptions, a requester would have the burden of proof to show that the ICIF-owner lacks definitive

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[22] *See* Order 888 at 31,648, quoting *Heartland Energy Services, Inc*, 68 FERC ¶ 61,223 (1994) ("for all future cases involving blanket approval of market-based rates an offer of comparable transmission services will be required before the Commission will be able to find that transmission market power has been adequately mitigated. In the context of an affiliated power marketer, this means that all of its affiliated utilities must have a comparable transmission tariff on file").

[23] *See* Order 888 at 31,656-57.

[24] Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904, 39,953 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252, P 408 (2007), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 FERC ¶ 61,260 (2007)("Order 697") (subsequent history omitted).

[25] For the competitive generator seeking access, the failure to provide comparable service creates a potent barrier to entry, even if such requests have been infrequent to date.

plans to use its capacity, and that the public interest under Sections 210 and 211 is better served by granting access to the third party than by allowing the ICIF-owner to reserve its ICIF capacity for its own future use.

While nominally "rebuttable," the proposed presumption is effectively irrebuttable. As described in the NOPR (P 30), the Commission's determinations as to whether the ICIF-owner and its affiliates have definitive plans have been based on confidential demonstrations. Because information on definitive plans (or the lack thereof) is available only to the ICIF-owner and its affiliates, third-party requestors will not be able to assess whether the required showing can be made, much less make it.

The bar on any "expansion" during the safe harbor period may also foreclose all interconnections during this period, even if the definitive plans presumption were miraculously surmounted. The NOPR does not define the term "expansion" as used in the proposed safe harbor, and it may well go beyond expansion of transfer capacity to encompass modifications of the ICIF-owner's facilities necessarily involved in any interconnection of a competitor's generator. Even if the term "expansion" were limited, the NOPR provides no demonstration of why it is reasonable, much less necessary, to foreclose economical and efficient expansion for which costs are borne by the requestor.

The NOPR states that the safe harbor would last for "five years" (P 54), but this monopoly will extend for longer. To avoid the impossible-to-surmount safe harbor barrier, a requestor must not file its Section 210/211 application until *after* the five-year period. *Id.*, P 57. The requestor has little realistic hope of securing a final order from the Commission requiring interconnection or transmission service before much of the

following year will have elapsed.[26] And that final order may herald only the beginning of the process of gaining access if additional studies or modifications are required.

Thus, the proposed safe harbor effectively grants to the ICIF-owner and its affiliates a monopoly over use of its ICIF for, at minimum, six years. That result cannot be harmonized with the Commission's obligations to remedy undue discrimination in transmission service and its reliance on competitive markets to ensure just and reasonable wholesale prices. For the Commission to maintain a generator's MBR status, while institutionalizing that generator's ability to withhold access to competitors, conflicts with the Commission's MBR policies and undermines the legal basis for market-based rates, which rely on a demonstration that the seller and its affiliates have mitigated vertical and horizontal market power.[27]

C. The NOPR's Treatment of Affiliates is Confusing and Contrary to Commission Policy

1. The NOPR's Treatment of Affiliates is Internally Inconsistent and Contrary to Commission MBR Policy

The Commission has long recognized the incentive and opportunity to use control over transmission to erect barriers to competitive generation and benefit the owner's corporate family.[28] Because such abuse of vertical market power can lead to unjust and

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[26] *See* Part I.B.1, above.

[27] *See, e.g.*, *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 919 (9th Cir. 2011) (finding Order 697 "a permissible approach to fulfilling [the Commission's] statutory mandate to ensure that rates are just and reasonable" because the Commission "screen[s] for market power before authorizing market-based rates, and [] continually monitor[s] sellers for evidence of market power"), *cert denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

[28] *See, e.g.*, Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266, 12,269 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241, P 12 (2007) ("Order 890"), *order on reh'g and clarification*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007) ("Order 890-A") (subsequent history omitted); Order 888 at 31,682.

unreasonable rates,[29] the Commission has spent decades crafting policies and regulations protecting customers from such actions,[30] including its MBR regulations that study and mitigate both the public utility's *and its affiliates'* vertical market power and potential to erect market barriers.[31] The Commission's recent MBR rulemaking notice proposes to facilitate the examination of corporate structure by requiring MBR sellers to provide an organization chart in addition to describing their affiliates and upstream owners.[32]

In contrast, the instant NOPR does not consider the ICIF-owner's affiliates in defining eligibility for the blanket waiver or safe harbor, potentially even if the ICIF-owner's affiliate is a TP (as discussed in the following section). This blind eye is internally inconsistent with the NOPR's proposal to continue the Commission's policy of allowing the ICIF-owner to point to its affiliate's planned usage to demonstrate (after the safe harbor period) definitive plans to use any remaining ICIF capacity. *See* NOPR, Proposed Section 35.28(d)(2)(ii)(A). By ignoring affiliates in determining eligibility for waiver or safe harbor, while allowing ICIF-owners to use those same affiliates to fend off third-party access, the NOPR would incent utilities to organize their corporate structures to maximize their opportunities to block third-party competitive generation.

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[29] *See, e.g.* Order 890, PP 12, 26.

[30] Order 697, P 6 ("The Commission's first and foremost duty is to protect customers from unjust and unreasonable rates").

[31] *See, e.g.* Order 697, P 408 (requiring MBR applicants to submit a vertical market power analysis examining it or its affiliates ownership, operation, or control of transmission facilities); 18 C.F.R. Part 33 (requiring applicants seeking FPA Section 203 authorization to include a description about and organizational chart depicting all energy subsidiaries and affiliates and to provide a vertical competitive impact analysis); *see also* Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996), FERC Stats. & Regs. ¶ 31,035 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 889-A, 62 Fed. Reg. 12,484 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,049 (1997) ("Order 889-A") (subsequent history omitted)(setting forth electric utility Standards of Conduct to prevent affiliate transmission abuse).

[32] Refinements to Policies and Procedures for Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 147 FERC ¶ 61,232, P 22 (2014).

2. The NOPR Would Allow TP Affiliates to Qualify for the Blanket Waiver Even Within the TP's Own Planning Region

Because the proposed blanket waiver qualification criteria include no affiliation-based limitations, affiliates of TPs can also take advantage of this waiver. *See* NOPR Proposed Section 35.28(d)(2). However, the NOPR (P 59) asks whether there is a need to limit the blanket waiver to affiliates of a public utility transmission provider within or adjacent to the TP's footprint.

TPs are already "in the business of providing transmission service"[33] and are subject to Standards of Conduct; they face no significant additional burden from the requirements the NOPR proposes to waive. If extended to affiliates of TPs, the proposed reforms would incent TPs to structure generation and ICIF development to avoid open access and transmission planning obligations. Thus, the proposed changes would support, rather than mitigate, the TP's incentive and opportunity to exercise vertical market power.

Exclusion from blanket waiver eligibility of affiliates within or adjacent to a TP's footprint is necessary to prevent the most obvious evasions of the TP's OATT.[34] However, because such exclusion may not cover all affiliated ICIF-owners in the region for which the TP bears responsibility for regional planning, it is too narrow to protect against undue discrimination and is inconsistent with Order 1000 and the Merchant Transmission Policy Statement, as discussed in Part II.D below.

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[33] NOPR, P 24.

[34] *See Puget Sound Energy, Inc.*, 133 FERC ¶ 61,160 (2010), *reh'g denied*, 139 FERC ¶ 61,241, P 3 (2012) ("where an applicant's generation project is serving its native load customers and where the applicant has an [OATT] on file with the Commission, generator lead lines to support such a project are properly governed by the terms and conditions of that existing OATT.").

II. IF THE COMMISSION MAKES ANY CHANGES TO EXISTING POLICY, IT SHOULD CHOOSE ALTERNATIVES LESS HARMFUL TO OPEN ACCESS AND COMPETITIVE MARKETS

Adoption of the proposed reforms is particularly unreasonable because alternatives are available to address the NOPR's concern (P 37) that the "time, effort and cost of complying with the requirements of a public utility [TP] unduly hinder generation development," without sacrificing the open transmission access necessary to foster competitive wholesale generation markets and to support grant of MBR authority. The NOPR, for example, cites as unduly burdensome: (1) the need for ICIF-owners to seek individual waivers of OATT, OASIS, and Standards of Conduct requirements, which are routinely granted by the Commission (P 36); (2) the low bar that third-party service requests must meet to trigger the requirement that an ICIF-owner file an OATT within 60 days (P 37); and (3) the requirement that ICIF-owners file an OATT following a third-party request, given that ICIF-owners typically can establish priority rights sufficient to justify denying access to the third party (P 3). Any legitimate burden concerns associated with those requirements can be remedied without turning back the clock, reverting to conditions that existed prior to Order 888, and requiring each third party seeking access to initiate a proceeding under FPA Sections 210 or 211 and to incur the time and expense involved in such litigation.

A. Eliminate the Requirement to Seek Individual Waivers that are Routinely Granted

According to the NOPR Information Collection Statement (P 62), the bulk of the regulatory burden associated with the Commission's existing treatment of ICIF-owners—approximately $14,600 per year, industry-wide—is attributable to the requirement that each ICIF-owner file an individual request for waiver of OATT, OASIS, and Standards

of Conduct requirements in advance of receiving a third-party request for service. Although APPA and TAPS believe that the cost of meeting this regulatory requirement is *de minimis*—according to the NOPR (*id.)*, less than $1,000 per applicant—we would not oppose an initial grant of such a blanket waiver of that requirement, *provided* that any final rule provides for revocation of such waivers upon the ICIF-owner's receipt of a third-party request for service that meets the heightened threshold requirements discussed below, and in other appropriate circumstances.

B. Retain the Obligation to File an OATT Sixty Days After a Request, but Reduce the Burden by Developing a Modified OATT and by Heightening the Threshold for First Requests to the ICIF-Owner's Corporate Family

As an initial matter, the NOPR fails to provide substantial evidence to demonstrate the need for reform of the existing requirement that an ICIF-owner file an OATT upon receipt of a third-party request for transmission or interconnection service. To the contrary, the NOPR finds that third-party requests to ICIF-owners for service are "infrequen[t]" (P 32) and "relatively rare" (P 36). According to Commission estimates (*id.*, P 62), industry-wide, the proposed rule would annually eliminate only one OATT filing by an ICIF-owner, and only one petition for declaratory order requesting priority rights. The total, annual, industry-wide costs of these regulatory requirements—respectively estimated by the Commission to be $9,100/year and $2,730/year (*id.)*—are tiny.

Nor has the NOPR demonstrated that the proposed procedures will cost less than existing requirements. It is hard to imagine that a regulatory structure based on the lengthy and costly procedures of FPA Sections 210 and 211 could possibly be less

expensive for ICIF-owners on an industry-wide basis[35]—unless the Commission *also* assumes that the costs of initiating such proceedings will effectively deter all third parties from ever seeking service under those provisions. The NOPR's proposal will therefore either: (1) be ineffective at reducing the regulatory costs of ICIF-owners, contrary to the NOPR's stated intent; or (2) function as a complete bar to open access, contrary to Commission precedent and its statutory obligations, as discussed above. The NOPR therefore fails to justify the need to change existing policy, let alone eliminate key open access protections, for at most negligible regulatory cost savings.

Even assuming some changes were justified, the Commission's regulatory burden concerns can be addressed by modest alterations to existing policy. Specifically, any final rule could: (1) require ICIF-owners to submit a standardized, more limited ("Modified") OATT after receipt of a qualified third-party request; and (2) require third parties to meet a heightened threshold for triggering that filing requirement.

1. A Modified OATT

In response to the NOI, APPA and TAPS proposed that the Commission standardize a "Modified OATT" that is consistent with existing precedent for use by eligible ICIF-owners.[36] While the Modified OATT should not remove core elements of open access, including the obligation to expand and the development of rates for point-to-point service, appropriate *pro forma* OATT modifications could include:

- Eliminating the OATT provisions for network transmission service, since only point-to-point service is relevant for purposes of ICIFs; and

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[35] To the contrary, the costs to an ICIF-owner of filing a response to a Section 210 or 211 application would likely exceed the Commission's estimated costs of filing an OATT and processing third-party requests under a standard tariff. *See* NOPR, P 62.

[36] TAPS NOI Comments at 8-9; APPA NOI Comments at 5-7.

- Eliminating the OATT provisions requiring that the transmission provider offer ancillary services.

APPA and TAPS also do not oppose waiver of the OASIS and Standards of Conduct requirements for ICIF-owners, subject to the affiliate limitations discussed in Part II.D below.

Tailoring a Modified OATT to ICIFs in this manner will reduce the regulatory burden on ICIF-owners and eliminate the need to apply for special waivers on a case-by-case basis. It will also maintain the balance reflected in the Commission's existing policy, including the obligation to file an OATT within 60 days of a third-party service request, and thereby preserve key limitations on the ICIF-owner's ability to discriminate and create barriers to entry to competitive markets.

2. Clarified and Heightened Thresholds for a Service Request to Trigger OATT Filing Requirement

The NOPR supports removal of the ICIF-owner's OATT filing obligation on the view that "the current policy creates too low a bar for third-party requests for service" (P 37):

> Specifically, an existing waiver of the OATT is revoked as soon as the ICIF owner receives a third-party request for service, even if that request meets few of the information and other requirements for transmission service under the *pro forma* OATT.

Id. While that is not our understanding of the Commission's existing requirements, any final rule could address this concern by specifying, as clarified in *Sagebrush, a Cal. P'ship*, 132 FERC ¶ 61,234, P 44 (2010) ("*Sagebrush*") (footnotes omitted, emphasis in original):

> [A] completed application sufficient to revoke waiver of an obligation to file an OATT must meet the **informational** requirements set forth in the *pro forma* OATT. More

> specifically, a request for transmission service by a non-affiliated third party will trigger the requirement to file a *pro forma* OATT in those instances where that request meets the criteria for a completed application set forth in either section 17.2, 18.2 or 29.2, depending upon which type of service is requested.

In addition, although the Commission has held that an ICIF-owner has no authority to charge a deposit for jurisdictional transmission service if it has not yet filed or received Commission approval of an OATT (*Sagebrush,* PP 43-44), the Commission could approve fee structures that enable an ICIF-owner to insist upon a reasonable deposit before the obligation to file a notice of receipt of a service request and, subsequently, an OATT is triggered.

The Commission could further mitigate the regulatory cost imposed on an ICIF-owner that has not previously (itself or via an affiliate) submitted an OATT. Specifically, if neither the ICIF-owner nor any of its affiliates has an OATT on file, the first third-party requesting interconnection or transmission service could be required to make a reasonable, nonrefundable deposit to cover the ICIF-owner's costs of filing a Modified OATT.[37] Such additional deposit would discourage speculative service requests that trigger a first-time OATT filing and fully address the specific ICIF-owner regulatory burden that the NOPR identifies.

While the extra deposit would increase costs for the first entity that seeks service from the ICIF-owner's corporate family, the amount of the deposit would be much lower than the costs of requesting, negotiating, and litigating service under Sections 210 and

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[37] This additional deposit should not be required where an ICIF-owner or its affiliate has previously filed an OATT because the new request triggers minimal additional costs (e.g., the cost of including the ICIF-owner under the affiliate OATT, or cloning the affiliate's OATT to create a new one specific to the ICIF-owner). A third-party requestor should be able to ascertain whether an additional "first time OATT filer" deposit is required on inquiry to the ICIF-owner.

211. According to the Commission's Paperwork Reduction Act Statements included with the NOPR (P 62), the costs of filing an OATT are $9,100. A nonrefundable deposit of $10,000 from the first third party that requests service (on top of the deposits already required under the *pro forma* OATT (e.g., a deposit equal to one month of service charges for transmission service requests, and $10,000 - $20,000 for interconnection service requests under the Standard Large Generator Interconnection Procedures)) should therefore be more than adequate to cover the ICIF-owner's additional regulatory costs associated with submitting a Modified OATT.

This approach has the further advantage of eliminating barriers to competition for any second or subsequent third party that requests service from the ICIF-owner. The NOPR (P 53) contemplates that even after the Commission has directed an ICIF-owner to provide service to one or more third parties under Sections 210 and 211, the ICIF-owner might still be eligible for the NOPR's proposed blanket waiver. Once a third party has paid the costs for the ICIF-owner to file a Modified OATT, however, there can be no legitimate reason to limit subsequent third-party service requests to Sections 210 and 211, as opposed to the terms and conditions of the OATT.[38]

C. At Minimum, Restrict the Blanket Waiver to a Limited Period

The NOPR places no limit on the proposed blanket waiver, extending it to periods when there is no reasonable expectation that the ICIF-owner is still in the project development mode. By limiting requestors to access only through Sections 210 and 211, even if the request is received many years after the ICIF is energized and there is ample

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[38] The costs associated with compliance with the Commission's open access requirements are includable in the ICIF-owner's transmission rates. *Terra-Gen Dixie Valley, LLC*, 147 FERC ¶ 61,122 (2014).

unused capacity, the NOPR creates a potent and permanent obstacle to open access that enhances the ICIF-owner's vertical market power without any justification.

To address this defect, if the Commission—notwithstanding the alternatives supported above—allows a blanket waiver that exempts the ICIF-owner from the requirement to file an OATT following a third-party request, the final rule should, at minimum, restrict the duration of that exemption. Specifically, after expiration of a limited period during which there is a very high expectation that the ICIF-owner will be able to establish priority rights, receipt of a qualified service request should trigger the obligation to file an OATT. For example, while APPA and TAPS oppose the five-year safe harbor rebuttal presumption proposed in the NOPR (*see* Part I.B.2 above), if the final rule authorizes a safe harbor for a defined (and preferably shorter) period, any OATT filing exemption should terminate no later than the time that the safe harbor presumption ends.[39] Failure to relieve third parties of the burden of seeking access through Sections 210 and 211 beyond that date encourages inefficient use of ICIFs and invites undue discrimination.

D. Any ICIF Policy Changes Must Exclude TP-Affiliate ICIF Within the TP's Planning Area

Regardless of which ICIF policy changes the Commission decides to adopt, it should exclude affiliates of TPs from eligibility for the blanket waiver or safe harbor status at least within the TP's planning region. Extension of the blanket waiver to the TP affiliates within the TP's planning region will allow the TP's corporate family to

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[39] If the safe harbor is rightly rejected, but the final rule grants eligible ICIF-owners a blanket waiver of their OATT filing obligation, that waiver should be automatically revoked after a pre-defined period (perhaps one or two years).

circumvent the TP's open access and transmission planning obligations.[40] Sanctioning such opportunities for abuse is contrary to the Commission's obligation to "facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities."[41]

Requiring TP-affiliated ICIF-owners within the TP's planning region to utilize the TP's existing OATT processes, rather than artificially walling-off such ICIF from access and transmission planning and expansion obligations, is necessary to prevent the TP from evading its affirmative obligation to "work within its transmission planning region to create a regional transmission plan."[42] To more narrowly limit the exclusion from the blanket waiver would also be inconsistent with the Merchant Transmission Policy Statement, where the Commission treated facilities within the TP's transmission planning region as incumbent facilities subject to the TP's OATT and planning obligations.[43] In so finding, the Commission recognized that TPs "have a clearly defined set of existing obligations under their OATTs with regard to new transmission development, including participation in regional planning processes and the processing of transmission service

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[40] TPs have an explicit obligation "to ensure that transmission infrastructure is constructed on a non-discriminatory basis and is otherwise sufficient to support reliable and economic service to all eligible customers." Order 890, P 52.

[41] FPA § 217(b)(4), 16 U.S.C. § 824q(b)(4).

[42] Order 1000, P 47; *see also*, *id.* P 148 ("Through the regional transmission planning process, [TPs] will be required to evaluate . . . transmission solutions that might meet the needs of the transmission planning region more efficiently or cost-effectively than solutions identified by individual [TPs] in their local transmission planning process.").

[43] Merchant Transmission Policy Statement, PP 41-42. Order 1000 (P 225) used a narrower definition of "incumbent," limiting it to the "existing retail distribution service territory or footprint" of the transmission provider. That definition, however, was crafted for a completely different purpose: defining the Right of First Refusal to construct transmission facilities and the rights of nonincumbent transmission developers to build such facilities.

request queues."[44] The same considerations mandate excluding TP-affiliated ICIF-owners from the blanket waiver and safe harbor with regard to at least their ICIF within the TP's planning region.

At an absolute minimum, to prevent the most obvious abuses, ICIF-owners affiliated with TPs should be excluded from the blanket waiver and safe harbor as to any ICIF within the TP's footprint or an adjacent system. *See* NOPR, P 37.[45]

III. ANY ICIF BLANKET WAIVER SHOULD APPLY EQUALLY TO NON-JURISDICTIONAL UTILITIES THAT ARE SUBJECT TO RECIPROCITY

The proposed blanket waiver is phrased in terms of "any *public utility* that is or becomes subject to [OATT, OASIS, or Standards of Conduct requirements] solely because it owns, controls, or operates [ICIF], in whole or in part, and sells electric energy from its Generating Facility." NOPR, Proposed Section 35.28(d)(2) (emphasis added). But it is silent on the availability of the blanket ICIF waiver to non-jurisdictional utilities for reciprocity purposes.

If, despite the comments above, the Commission modifies its regulations to create blanket waivers for public utility ICIF-owners, it should make express that the same blanket waiver and safe harbor will apply to non-jurisdictional utilities for purposes of satisfying reciprocity obligations. Non-public utilities (i.e., entities described in Section 201(f)) are not directly subject to OATT, OASIS, and Standards of Conduct requirements, but are obligated to provide reciprocal service over transmission they own,

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[44] Merchant Transmission Policy Statement, P 41.

[45] *See Puget Sound Energy, Inc.*, 133 FERC ¶ 61,160, P 11 (denying request for priority rights over generator lead interconnecting to third-party system).

operate, or control as a condition of taking service under a public utility's OATT.[46] The Commission considers requests "for waiver of all or part of the reciprocity provision . . . using the same criteria used to determine whether to grant a waiver to a public utility."[47] The final rule should make clear that this principle extends to any blanket waiver and safe harbor adopted in this proceeding with respect to ICIF-owners. Non-jurisdictional ICIF-owners are "electric utilities" subject to Section 210; and "transmitting utilities" subject to Section 211 include Section 201(f) entities. Non-jurisdictional ICIF-owners are therefore subject to the procedures proposed to be used as result of the blanket waiver. [48]

To the extent a non-public utility is subject to reciprocity solely because it owns, controls, or operates ICIF and sells energy from its generation facility, it should be able to point to any blanket waiver adopted by the final rule for public utilities as eliminating its obligation to individually file for "limited and discrete" waivers to satisfy reciprocity obligations, thereby avoiding the burden on it and the Commission associated with such waivers. In addition, any restrictions or safe harbors adopted with respect to Section 210

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[46] Commission policy requires an open access transmission customer, including a non-public utility, to stand ready to provide reciprocal transmission service, if requested, over any transmission facilities that it owns, operates, or controls to any public utility from which it takes open access transmission service. Order 888 at 31,760. Reciprocity subsequently was expanded, requiring "a customer . . . that takes service from an RTO or ISO to provide comparable service, to the extent it owns transmission facilities, . . . to the transmission-owning members of the RTO or ISO." Order 890-A, P 37. The Commission has stated that "absent a waiver, the obligation to provide reciprocal, non-discriminatory services necessarily commits the customer of open access service, even if not a public utility, to abide by the OASIS and standards of conduct requirements." Order 889-A at 30,553.

[47] *Cent. Minn. Municipal Power Agency*, 79 FERC ¶ 61,260, 62,127 (1997) (citing Order 888 at 31,763; *Dakota Elec. Ass'n.*, 78 FERC ¶ 61,117, 61,452 (1997)).

[48] NOPR, P 51 (limiting application of the blanket waiver to situations "where sections 210 and 211 would provide interconnection and transmission access"). The NOPR (PP 51-52) inquires as to whether its blanket waiver and safe harbor can be extended to ICIF-owners that are not "electric utilities" subject to providing service pursuant to Sections 210 and 211. While APPA and TAPS do not understand how a policy predicated on the availability of statutory procedures can be applied to those not subject to those statutory procedures, that concern does not pertain to Section 201(f) entities.

or 211 proceedings regarding public utility ICIF (e.g., NOPR, Proposed Section 35.28(d)(2)(ii)) should also be available to such a non-public utility.

CONCLUSION

APPA and TAPS therefore request the Commission develop its final rule in consideration of our comments, rather than adopt the NOPR as proposed.

Respectfully submitted,

/s/ Cynthia S. Bogorad

Cynthia S. Bogorad
William S. Huang
Anjali G. Patel

Attorneys for
American Public Power Association
and Transmission Access Policy
Study Group

Law Offices of:
SPIEGEL & MCDIARMID LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

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