FERC Issues Notice of Inquiry regarding Open Access to Generator-Owned Interconnection Facilities by Third Parties

The Federal Energy Regulatory Commission ("FERC") issued a Notice of Inquiry on April 19th ("NOI") seeking comment on its policy regarding capacity priority rights and open access on developer-owned interconnection facilities that connect generation facilities to the integrated transmission grid ("Interconnection Facilities"). Currently, FERC applies its policy on a case-by-case basis and, in some cases, has treated such Interconnection Facilities as transmission facilities for the purpose of open access issues. FERC held a technical conference in March 2011 to address, among other issues, FERC’s policy on priority rights and open access on Interconnection Facilities. FERC’s NOI is based, in part, on the comments that FERC received subsequent to that conference.

Current FERC Policy

Pursuant to Order No. 2003, generation developers seeking to interconnect with the integrated transmission grid must submit an interconnection application pursuant to the transmission provider’s Large Generator Interconnection Procedures and execute a pro forma Large Generator Interconnection Agreement ("LGIA"). Interconnection facilities are constructed to permit one or more generation facilities to interconnect with the grid. Interconnection facilities can be relatively short ancillary components to a single generation facility, or such facilities can span much longer distances and have significant transmission capacity capable of interconnecting additional generation facilities.

A third party’s ability to use an existing interconnection facility depends on whether the transmission provider or the generation developer owns the facility. When the transmission provider owns the interconnection facilities, third party use of such facilities is governed by the LGIA. Section 9.9.2. of the LGIA states:

“...if the Parties mutually agree, such agreement not to be unreasonably withheld, to allow one or more third parties to use Transmission Provider’s Interconnection Facilities, or any part thereof, Interconnection Customer will be entitled to compensation for the capital expenses it incurred in connection with the Interconnection Facilities based upon the pro rata use of the Interconnection Facilities by the Transmission Provider, all third-party users and the Interconnection Customer…”

When a generation developer has funded and developed a portion of the interconnection facilities and continues to own such facilities, LGIA provisions governing third party open access do not apply. FERC has addressed third parties seeking to use developer-owned Interconnection Facilities on a case-by-case basis. FERC requires that a developer-owner of an Interconnection Facility file a pro forma Open Access Transmission Tariff ("OATT") with FERC within 60 days of receiving a request for transmission from an unaffiliated third party.

FERC’s current policy regarding third party access to developer-owned Interconnection Facilities seeks to prevent undue discrimination by ensuring that third parties have open access to available transfer capability that is not being used by the developer of the applicable Interconnection Facility. In the past, however, FERC has permitted a developer to have priority over third parties for unused capacity on Interconnection Facilities that the developer owns provided the developer can show that the priority is sufficiently justified. For example, FERC granted
a developer priority over a third party seeking to interconnect to the developer’s Interconnection Facility because the developer proved that it had specific, pre-existing generator expansion plans with milestones for construction of the generation facilities and demonstrated that it had made material progress towards meeting those milestones.\(^2\) FERC has initiated this proceeding to assess whether FERC’s current policy should be revised and, if so, how should priority rights and open access issues regarding developer-owned Interconnection Facilities be handled.

**FERC Inquiries**

FERC seeks general comments on the issue of priority rights and open access on developer-owned Interconnection Facilities, as well as comments responding to specific questions that it poses in the NOI. These questions focus on topics such as how the industry has adapted to FERC’s current policy, whether small and large developer-owned Interconnection Facilities should be treated differently, whether interconnection requests from affiliates should be treated differently than unaffiliated third party interconnection requests, and whether there is a meaningful distinction between the interconnection/operation of independent transmission lines and long, high capacity developer-owned Interconnection Facilities.

FERC sets forth two alternative policies for governing how third parties can obtain interconnection rights on developer-owned Interconnection Facilities. The first alternative is to continue requiring developers that own an Interconnection Facility to file an OATT within 60 days of receiving a third party interconnection request while making case-by-case determinations of developer capacity rights. FERC seeks comment on when the developer that owns the Interconnection Facility should be required to file an OATT and whether that OATT should be tailored to address the issue of open access. Furthermore, FERC seeks comment on whether it should continue making such case-by-case determinations and, if so, whether specific criteria should be developed to assess whether priority rights should be granted to the developer that owns the Interconnection Facility. Lastly, FERC wants to assess whether granting priority rights of capacity to the developer that owns the Interconnection Facility for a set period of years is a viable approach and, if so, how this safe harbor can be structured and implemented.

The second alternative proposed by FERC is to extend existing LGIA provisions that govern third party use of provider-owned Interconnection Facilities to third party use of developer-owned Interconnection Facilities. This would permit the developer to negotiate with the third party regarding use of that developer’s Interconnection Facility. The developer would be entitled to receive compensation for capital expenses that it incurred in constructing the facility and to receive compensation for ongoing operation and maintenance costs. FERC notes that some commenters argue that using the LGIA framework would alleviate the need for developers to file an OATT for Interconnection Facilities they own, thereby avoiding the time and expense associated with developing an OATT. FERC seeks comments on issues such as whether using the LGIA framework would be sufficient to provide open access to third parties, what other modifications to the LGIA should be made, whether third parties should apply for interconnection on the developer-owned Interconnection Facility directly to the transmission provider and then engage in threeway negotiations, and how priority rights to a developer-owned Interconnection Facility should be handled in the LGIA when the developer is developing generation facilities in phases.

**Implications**

Open access to developer-owned Interconnection Facilities is a critical issue to both the developer of such a facility and third-party developers that want to interconnect to that facility. FERC has to consider how to balance the interests of both parties. Many stakeholders view FERC’s current policy as a disincentive to being the first generator developer to build an Interconnection Facility. With the increase in development of renewable energy generation, which can require long, high capacity interconnection facilities because of the distance between such generation and transmission lines, the preservation of priority rights to developer-owned Interconnection Facilities is becoming increasingly important. Preservation of priority rights is also critical to securing the financing needed to develop multi-phase generation facilities—lenders want to ensure that there will be available capacity on the developer-owned Interconnection Facility when later phases come online.

Comments to the NOI are due on or before June 11, 2012 (i.e., 45 days after the NOI was published in the Federal Register).

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1. In the past, FERC has referred to such facilities as “generator lead lines.”