

FERC Policy On Independent and Merchant Transmission Projects

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I would like to thank the Commission for permitting me to speak at this important technical conference. My comments are offered from the perspective of someone who has represented several transmission project developers who do not propose to recover the costs of their projects from captive customers pursuant to FERC-approved cost allocation mechanisms. I have been involved in several of these projects and hope to offer constructive suggestions for making more of them successful.

Transmission is very hard to build, and even in cases where everyone agrees it is needed, it is still difficult to find someone willing to pay for it. The independent and merchant transmission projects that are the subject of this Technical Conference do not seek cost recovery from captive customers under a traditional OATT. Cost recovery is grounded in "beneficiary pays" principles; the projects can go forward only if the developer can demonstrate sufficient value to cause someone with sufficient credit to volunteer to pay for the transmission. The Commission should be favorably disposed towards these projects because they represent entrepreneurial activity in the marketplace and provide an alternative to transmission expansions funded by captive customers, which raise difficult issues over cost responsibility.

I am here to ask the Commission to provide more flexibility to the developers of independent and merchant transmission projects. My concern over Commission policy involves what I perceive to be an over-reliance on generic rules under the broad rubric of "open access" as a substitute for a factual analysis of whether actual undue discrimination exists in granting rights to transmission capacity on an independent developer's project. I am proposing that the Commission be less prescriptive in circumstances where no one has made a factual showing that they are the victim of undue discrimination; that the Commission be willing to analyze the facts presented in those cases where undue discrimination is alleged; and that the Commission recognize that decisions made in order to make a transmission project economically successful, even if they do not treat every potential user equally, may not constitute "undue" discrimination.

The Commission's open access rules are based on findings made in Order No. 888 regarding the incentives and behavior of incumbent transmission owners who recovered the costs of their transmission facilities from captive customers and who typically owned generation or had other merchant interests in their transmission service areas. The Commission found that these public utilities had a history of favoring their own use of their transmission over third party use, and that this particular form of discrimination violates the FPA. These findings, however, do not apply to the activities of a

transmission project developer who does not own existing transmission facilities and therefore has no market power, has no captive customers who will be asked to pay for the proposed project, and may have no affiliate generation or marketing interests that could be affected by its access decisions. It is, of course, possible that such a transmission developer would have reasons for engaging in “undue discrimination” in assigning capacity, but the incentive for it to do so is obscure and usually very different from those discussed in Order No. 888.

The Commission’s open access remedy applicable to existing transmission providers reduces the need and justification for generic limitations on the flexibility afforded to independent developers to structure their projects. Because of open access, an eligible customer has the option of asking the existing transmission provider to interconnect and provide transmission service, and if insufficient capacity exists on the provider’s system, to direct the provider to determine the incremental cost to satisfy the request for service. In addition, independent transmission developers face potential competition from other developers who may wish to promote competing projects. As a practical matter, project developers must work collaboratively with existing transmission owners with whom they must interconnect, and they must also get their projects approved in siting proceedings in which projects are subject to being rejected or modified based on any number of considerations, including the existence of alternatives.

The Commission should also afford more flexibility because of the very nature of most participant funded transmission projects. A typical participant funded transmission project comes about by bringing together one or more power producers, a transmission developer and load-serving entities (“LSEs”) or other buyers. These parties need to work together to create a project that has sufficiently compelling economics that the generators want to interconnect to the project and the downstream buyers of power are willing to enter into PPAs that will support financing. These transactions are complex undertakings with a variety of economic and regulatory considerations, and maximum flexibility is necessary to make them successful. The question whether “undue” discrimination has occurred should depend on the economic rationale for the developer’s access decisions in light of the facts surrounding the particular project, and the Commission should not address the issue if no one complains.

In contrast with participant funded projects that utilize cost-based transmission rates, project developers who seek negotiated, or market-based rates should expect greater up front scrutiny from the Commission because the Commission must make findings to support the grant of market-based pricing. However, I urge the Commission to recognize that the developers of these projects face huge hurdles in identifying and signing up credit worthy, long term transmission customers who can support financing of their projects. This is a very tough market and in my experience cases where developers can truly dictate price to their customers are rare or non-existent. The Commission should provide developers of merchant projects as much flexibility as it can under the FPA because the developers need this flexibility in order for their projects to succeed. In the event they earn a return that exceeds a typical regulated return, it will be the result of voluntary decisions of customers and the developer will have earned its return as a fair risk premium.

Thank you for your time and attention.